STATE OF MICHIGAN

IN THE SUPREME COURT

NEXTEER AUTOMOTIVE CORPORATION, a Delaware corporation,

Supreme Court Case No. 153413

Plaintiff/Appellee,

Court of Appeals No. 324463

v.

MANDO AMERICA CORPORATION, a
Michigan corporation, TONY DODAK,
ABRAHAM GEBREGERGIS,
RAMAKRISHNAN
RAJAVENKITASUBRAMONY, CHRISTIAN
ROSS, KEVIN ROSS, TOMY SEBASTIAN,
THEODORE G. SEEGER, TROY STRIETER,
JEREMY J. WARMBIER, and SCOTT

Saginaw County Circuit Court Case No. 13-021401-CK Hon. M. Randall Jurrens (P27637)

PLAINTIFF-APPELLEE NEXTEER
AUTOMOTIVE CORPORATION'S
SUPPLEMENTAL BRIEF IN
OPPOSITION TO DEFENDANTSAPPELLANTS' APPLICATION FOR
LEAVE TO APPEAL

Defendants/Appellants,

ORAL ARGUMENT REQUESTED

And

CHRISTIAN ROSS, KEVIN ROSS, TOMY SEBASTIAN, THEODORE G. SEEGER and TONY DODAK,

WENDLING, jointly and severally,

Counter/Third-Party Plaintiffs,

v.

NEXTEER AUTOMOTIVE CORPORATION, A Delaware corporation, LAURENT BRESSON, and FRANK LUBISCHER,

Counter/Third-Party Defendants.

Foley & Lardner LLP

John F. Birmingham (P47150)

John R. Trentacosta (P31856)

Nicholas J. Ellis (P73174)

Counsel for Nexteer, Bresson and Lubischer

500 Woodward Ave,, Suite 2700

Detroit, MI 48226-3489

Telephone: (313) 234-7100

Shea Aiello & Doxsie PLLC

David J. Shea (P41399)

Attorneys for Dodak, C. Ross, K. Ross,

Sebastian, and Seeger

26200 American Drive, Third Floor

Southfield, MI 48034

Telephone: (248) 354-0224

Plunkett Cooney, P.C.

Mary Massaron (P43885)

Counsel for Mando

38505 Woodward Ave., Suite 2000

Bloomfield Hills, MI 48304

Telephone: (313) 983-4801

Giarmarco Mullins & Horton PC

Andrew T. Baran (P31883)

William H. Horton (P31567)

Counsel for Mando

101 W. Big Beaver Road, Tenth Floor

Troy, MI 48084-5280

Telephone: (248) 457-7000

Braun Kendrick Finkbeiner PLC

C. Patrick Kaltenbach (P15666)

Attorneys for Gebregergis,

Rajavenkitasubramony, Strieter, Warmbier, and

Wending

4301 Fashion Square Blvd.

Saginaw, MI 48603

Telephone: (989) 498-2100

Cohen & Gresser LLP

Alexandra S. Wald

Mark D. Spatz

Sang Min Lee

Counsel for Mando

800 Third Ave., 21st Floor New York, New York 10022

T. 1 . 1 . (212) 692 0415

Telephone: (212) 682-9415

TABLE OF CONTENTS

1.	11/11	INTRODUCTION		
II.	RESTATEMENT OF FACTS AND PROCEDURAL HISTORY			
III.	SUPPLEMENTAL ARGUMENT			
	A.	A Party Asserting An Express Waiver Of A Right To Arbitrate Does Not Need To Demonstrate That It Was Prejudiced By The Actions Of The Party Asserting That Right		5
		1.	True Waiver, Including Express Waiver, Does Not Require Prejudice	5
		2.	Courts That Have Required Prejudice Actually Are Applying Waiver By Estoppel	10
	В.	Defendants' Stipulation To The Case Management Order In This Case Is An Express Waiver Of Any Right To Arbitrate That Otherwise May Have Existed		
		1.	Mando Was Aware Of The Arbitration Provision	17
		2.	By Agreeing To The CMO, Mando Expressed Its Intention To Relinquish Or Abandon A Claim For Arbitration	17
		<i>3</i> .	Defendants' Waiver Was Not "Preliminary"	18
		4.	Defendants' Statement In The CMO Regarding Arbitration Was Not Limited To Nexteer's Request For Injunctive Relief	23
		5.	Facts Supporting Defendants' Waiver Are Not Limited To The CMO	24
IV.	CON	CLUS	ION	25

TABLE OF AUTHORITIES

Page(s) **Federal Cases** American Home Assurance Co v Fremont Indem Co, 1992 US Dist LEXIS 7512 (SDNY May 29, 1992)(unpublished case, attached Apollo Theater Found Inc v W Int'l Syndication, 2004 US Dist LEXIS 11110 (SDNY June 21, 2004) (unpublished case Cabinetree of Wisconsin Inc v Kraftmaid Cabinetry Inc, Camp Ne'er Too Late LP v Swepi LP, --- F Supp 3d ---, 2016 WL 2594186 (MD Pa May 5, 2016) (unpublished case attached as Exhibit U)......9 Century Indemnity Co v Viacom Int'l Inc, 2003 WL 402792 (SDNY Feb 20, 2003) (unpublished case attached as Exhibit In re Charter Behavioral Health Sys, LLC, In re CMGT Inc. CX Digital Media v Smoking Everywhere, No 09-62020-CIV, 2011 WL 1102782 (SD Fla Mar 23, 2011) (Unpublished Fisher v AG Becker Paribus, Inc. 791 F2d 691 (CA 9 1986)......14 Gilmore v Shearson/American Express, Inc., 811 F2d 108 (CA 2 1987)9, 10, 16 Gonyea v John Hancock Mut Life Ins, 812 F Supp 445 (D Vt 1993)......9 Power v Tyco Int'l (US) Inc, 2006 WL 1628588 (SDNY 2006) (unpublished case attached as Exhibit X)19

Triton Container Int'l Ltd v Baltic Shipping Co, 1995 WL 729329 (ED La Dec 8, 1995) (unpublished case attached as Exhibit T)	9
Van Ness Townhouses v Mar Indus Corp, 862 F2d 754 (1988)	14
West Ridge Group LLC v First Trust Co of Onaga, 2008 WL 5156437 (D Colo Dec 9, 2008) (unpublished case attached as Exhibit W), aff'd, 414 Fed Appx 112 (CA 10 2011)	19, 21
State Cases	
Amalgamated Transit Union v Southeastern Mich Traps Auth, 437 Mich 441 (1991)	18
Awanderlust Travel Inc v Kochevar, 21 P3d 876 (Colo Ct App 2001)	17
Bailey v Kerns, 431 SE2d 312 (Va 1993)	19
Burns v Olde Discount Corporation, 212 Mich App 576 (1995)	12, 13
Coon v Gilbert, Docket No 324463, 2010 Mich App LEXIS 368, Docket No 324463 (Feb 23, 2010)	13
Evelyn v Raven Realty Inc, 215 Md 467, 138 A2d 898 (1958)	11
Hassberger v Gen'l Builders Supply Co, 213 Mich 489 (1921)	7
Joba Constr Co v Monroe County Drain Comm's, 150 Mich App 173 (1986)	
Johnston v Manhattan Fire & Marine Ins Co, 294 Mich 550 (1940)	18
Kauffman v The Chicago Corporation, 187 Mich App 284 (1990)	11, 12
Lending Tree LLC v Anderson, 747 SE2d 292 (NC Ct App Aug 5, 2013)	19

McElroy v BF Goodrich Co, F3d 722, 724 (CA 7 1996)	7
McLaughlin v CSX Transportation Inc, No 3:06CV-154, 2008 WL 3850709 (Aug 14, 2008)	15
MSO, LLC v DeSimone, 94 A3d 1189 (Conn 2014)	14, 15
Parsons v Halliburton Energy Servs Inc, 785 SE2d 844 (WVa 2016)8, 9, 10, 11, 1	6, 17, 18, 24
Quality Prods & Concepts Co v Nagel Precision, Inc, 469 Mich 362 (2003)	6, 10, 16, 17
Trim v Daniels, 862 SW2d 8 (Tex Ct App 1992)	20
State Statutes	
Michigan Uniform Trade Secret Act; 7	3
Other Authorities	
13 Williston on Contracts § 39:27 (4th ed)	6, 10, 16, 24
13 Williston on Contracts § 39:28 (4th ed)	11, 12, 16
George Smith and Thomas Hall, <u>Critical Distinctions Between Waiver and Estoppel</u> .	11
MCR 2.116(C)(8)	4
MCR 2.116(D)(1) and (D)(2)	21
MCR 2.401	19
Report of the Caseflow Management Rules Committee, 435 Mich 1210 (1990)	19

STATEMENT OF SUPPLEMENTAL QUESTIONS PRESENTED

1. Whether a party asserting an express waiver of a right to arbitrate must demonstrate that it was prejudiced by the actions of the party asserting that right.

Defendants-Appellants answer: Yes

Plaintiff-Appellee answers: No

The Circuit Court answered: Yes

The Court of Appeals answered: No

2. Whether the case management order in this case constituted an express waiver of the right of the Defendant, Mando America Corporation, to arbitrate.

Defendants-Appellants answer: No

Plaintiff-Appellee answers: Yes

The Circuit Court answered: Unclear

The Court of Appeals answered: Yes

Pursuant to the Court's Order dated November 2, 2016, Nexteer¹ respectfully submits this Supplemental Brief in Opposition to Defendants' Application for Leave to Appeal.

I. <u>INTRODUCTION</u>

Prejudice is not required for an express waiver of a right to arbitration. No Michigan court has required prejudice in enforcing an express waiver. While some courts have suggested that prejudice is necessary while discussing "implied waivers", such general statements result from a lack of clarity regarding the nature of the "waiver" being asserted. A true waiver requires only that the party intentionally relinquished or abandoned a known right to arbitration. Such a waiver may be made by an express statement or it may be inferred from conduct. In either case, the focus of the inquiry is on the intent of the party alleged to have made the waiver. A "waiver" also may arise under the doctrine of estoppel. Under a theory of waiver by estoppel, a party may waive its right to arbitration, without intending to do so, if it engaged in actions inconsistent with that right and the party asserting the waiver has been prejudiced. When examined closely, it is clear that the cases upon which Defendants' rely for their argument that waiver requires prejudice actually are applying the doctrine of waiver by estoppel.

Thus, the appropriate line of inquiry for reviewing whether Defendants waived any right to arbitration that otherwise might have existed is as follows. First, it must be determined whether Defendants, through an express statement or by their actions, evidenced an intent not to proceed with the now claimed right to arbitration. If the answer is yes, the inquiry is over and Defendants have made a true waiver of the right to arbitration. If the answer is no, only then is it necessary to reach the issue of prejudice. Even if Defendants did not intend to relinquish or

¹ Unless otherwise defined herein, all capitalized terms retain the definition given to them in Plaintiff-Appellee Nexteer Automotive Corporation's Answer in Opposition to Defendants-Appellants' Application for Leave to Appeal.

abandon their argument that they are entitled to arbitration, Defendants still are subject to a waiver by estoppel because Nexteer was prejudiced by Defendants' actions.

The Court of Appeals properly held that Defendants expressly waived any right to arbitration by stipulating in the CMO that the arbitration provision now at issue "was not applicable." (Answer Exhibit D, p 3).² Defendants, with full awareness of the arbitration provision in question, stipulated that the provision in question was not applicable, that Defendants did not intend to file a motion to compel arbitration, and that they intended to proceed in court. Such actions demonstrate Defendants' clear intent to abandon or relinquish any right to arbitration that otherwise existed.³ It was not necessary for Nexteer to show prejudice.

Contrary to the arguments made by Defendants and proposed Amicus Curiae, the Michigan Defense Trial Counsel, Inc. ("Amicus Curiae"), the CMO was not just a "preliminary" document that cannot constitute a waiver. The CMO is a binding order by the Circuit Court that incorporated the parties' positions on certain issues, including arbitration. It is an important management document that governs the progress and management of the case. Among other things, the CMO is intended to identify any disputes regarding whether the Circuit Court is the appropriate forum for the case. There is not, as Defendants would have it, a "grace period" at the outset of a case during which parties cannot waive their rights. No such rule is provided for under the Michigan Court Rules and Defendants' suggestion is fundamentally inconsistent with the fact that Defendants were free to waive any right to arbitration even before Nexteer filed this

² Exhibits A-Q are attached to Plaintiff-Appellee Nexteer Automotive Corporation's Answer in Opposition to Defendants-Appellants' Application for Leave to Appeal. Exhibits R-Z are attached to this Supplemental Brief.

³ The only other alternative is that Defendants agree with Nexteer that the arbitration provision now at issue is not applicable to this dispute.

action. Moreover, the form of the document evidencing the waiver is not material. Defendants could have waived their alleged right to arbitration on a napkin, so long as they clearly expressed that intent.

Therefore, it was not necessary for the Court of Appeals to reach the issue of whether Nexteer had suffered prejudice and the Court of Appeals' decision should be affirmed.⁴

II. RESTATEMENT OF FACTS AND PROCEDURAL HISTORY

Nexteer relies on the Counterstatement of Facts and the Procedural History set forth in its Answer in Opposition to Defendants' Application for Leave to Appeal (the "Answer"). The factual and procedural background most critical to the issues addressed in this Supplemental Brief are summarized below for convenience:

- Nexteer commenced this lawsuit on November 5, 2013 alleging nine causes of action: 1) breach of contract against the Former Employees based upon the Employment Agreements; 2) tortious interference with business relationship/business expectations; 3) tortious interference with contract; 4) breach of fiduciary duty; 5) aiding and abetting/knowing participation in breach of fiduciary duty; 6) violation of the Michigan Uniform Trade Secret Act; 7) unjust enrichment/quantum meruit; 8) common law/statutory conversion; and 9) civil conspiracy. Answer, Exhibit A. In its Complaint, Nexteer requests a jury trial as well as monetary damages and injunctive relief. *Id*.
- On November 25, 2013, following a case management conference, the Circuit Court entered the CMO. Answer, Exhibit D. Prior to entry of the CMO, both parties were given an opportunity to review the CMO and both parties approved the CMO. Answer, Exhibits D, F p 4.
- As part of the CMO, both parties agreed that, while there was an existing arbitration provision, it was "not applicable." Exhibit D, p 2. Although the CMO contains a box allowing the Circuit Court and the parties to indicate that the arbitration provision "is/will be the subject of a timely motion," Defendants did not request that this box be marked. *Id*.

⁴ As detailed in Nexteer's Answer, Nexteer was prejudiced by Defendants' actions. Thus, the Court of Appeals' decision should be affirmed even if the Court determines that Nexteer was required to show prejudice.

- In addition to addressing the issue of arbitration, the CMO also provided that the relief sought by Nexteer included both injunctive relief and monetary damages, as well as that a settlement/trial management conference will be held prior to trial. *See* Exhibit D, pp 1, 3.
- Mando filed its Answer to the First Amended Complaint (its operative pleading) on December 18, 2013. Answer, Exhibit F. Consistent with its agreement in the CMO, while it pleaded affirmative defenses that would only be applicable to any post-injunction proceedings, at no point in Mando's Answer did it assert any right to arbitrate Nexteer's claims even after Nexteer sought a jury demand. *Id*.
- On December 19, 2013, Defendants filed a motion for summary disposition and for protective order pursuant to MCR 2.116(C)(8), asking the Circuit Court to make legal determinations regarding Nexteer's claims. See Answer, Exhibit G. At no point in Defendants' motion for summary disposition did they seek to compel arbitration of Nexteer's claims. On February 26, 2014, following oral argument, the Circuit Court granted in part and denied in part Mando's motion for summary disposition. Answer, Exhibit G. The Circuit Court dismissed, in whole or in part, seven out of the nine counts asserted by Nexteer. Id.
- On February 28, 2014, Defendants issued their first set of discovery requests to Nexteer requesting information and documents going to the overall merits of the case, and not limited to the narrow issue to which Defendants now claim the Circuit Court confined the case. Exhibit R.
- On March 14, 2014, the Third-Party Plaintiffs filed counterclaims against Nexteer and two Nexteer executives claiming defamation and abuse of process directly related to Nexteer's allegations made in its First Amended Complaint, and demanded a jury trial on those counterclaims. *See* Answer, Exhibit O.
- On May 8, 2014 (six months after Nexteer initiated this lawsuit, and four months after it obtained dismissal, or partial dismissal, of seven out of the nine counts in Nexteer's complaint), Defendants raised the issue of arbitration for the first time when Mando filed its motion for leave to file an amended answer and to compel arbitration of Nexteer's remaining claims on the basis of the NDA. Answer, Exhibit O.
- On July 10, 2014, the Circuit Court issued an Opinion granting Mando's motion and compelling arbitration as to all of Nexteer's remaining claims, even those claims involving the Former Employees who are not parties to the NDA. Answer, Exhibit E. Despite noting that it had serious misgivings regarding Defendants' stipulation in the CMO that the arbitration provision was "not applicable" the Opinion makes clear that the Circuit Court believed it was obligated to find prejudice before it could enforce a waiver. *Id.* at p 12. Notably, at no point in the Circuit Court did Defendants make the argument upon which they now seek to rely, that their agreement the arbitration provision is not applicable only was

intended to apply to the preliminary injunction phase. Answer, Exhibit K. On August 22, 2014, the Circuit Court entered the final Arbitration Order granting Mando's motion. Answer, Exhibit H.

• On February 11, 2016, the Court of Appeals issued a decision reversing the Circuit Court's dismissal of the case for arbitration and remanding to the Circuit Court. Answer, Exhibit J. The Court of Appeals concluded that Mando waived its right to arbitration based on the CMO.⁵ Specifically,

...Mando stipulated that the arbitration provision in the nondisclosure agreement between Nexteer and Mando did not apply to the parties' controversy. The language of the stipulation showed knowledge of an arbitration provision and a clear expression of intent not to pursue arbitration. We conclude that the trial court erred when it determined that Mando's statement was not an express waiver because the stipulation directly indicated an intent not to pursue arbitration, which was the same right that Mando sought to assert six months later. *Id.* at 3.

• The Court of Appeals rejected Mando's (and the Circuit Court's) argument that Nexteer was required to show prejudice. Specifically, the Court of Appeals noted that "where there is an express waiver, the party seeking to enforce the waiver need not show prejudice. See *Quality Prods*, 469 Mich at 378-379 (stating that discussion of implied waivers is unnecessary if an express waiver exists)." *Id.* at 4.

III. SUPPLEMENTAL ARGUMENT

A. A Party Asserting An Express Waiver Of A Right To Arbitrate Does Not Need To Demonstrate That It Was Prejudiced By The Actions Of The Party Asserting That Right

1. True Waiver, Including Express Waiver, Does Not Require Prejudice

An express waiver of a right to arbitration does not require that the party asserting the waiver show prejudice. That is because any time that the intent not to enforce a contractual right

⁵ The Court of Appeals' Opinion did not address the other claims raised in Nexteer's Appeal including its arguments that: (1) the Circuit Court erred in finding that the claims at issue are within the scope of the arbitration provision in question; and (2) the Circuit Court erred in finding that Nexteer had not been prejudiced by Defendants' actions. If the Court reverses the Court of Appeals decision, it will be necessary to remand the matter to the Court of Appeals for a determination of the remaining issues raised on appeal.

has been evidenced, there is no need for prejudice. A waiver is nothing more than intentional relinquishment or abandonment of a known right. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 374 (2003). "A party may waive any of its contractual rights, including the right to arbitrate." *Joba Constr Co v Monroe County Drain Comm's*, 150 Mich App 173, 178 (1986).

There are several ways in which a party may be found to have waived a contractual right. The Court of Appeals discussed these issues in terms of "express" and "implied" waiver. Answer, Exhibit J, p 3. However, such a binary approach does not fully encompass the issue. The more salient distinction is between a true waiver (which can be express or implied from conduct) and a waiver by estoppel. Waiver of a contract provision may be made by a party's express declaration. 13 Williston on Contracts § 39:27 (4th ed). A waiver also may be implied from statements that fall short of an express declaration of waiver, as well as from the parties' conduct and acts, and circumstances surrounding performance of the contract. Id. However, the law distinguishes between a true waiver and a waiver by estoppel. "A true waiver... is dependent solely on what the party charged with waiver intends to do, and there is no need to show reliance by the party asserting or claiming the waiver." Id. at § 39:28. Conversely, "a waiver by estoppel, implied from a party's conduct, depends not so much on the intention of the waiving party as on the reliance of the nonwaiving party[.]" Id. Some cases discussing "implied waiver" have suggested prejudice is required. However, as detailed in Sections III.A.2 and III.A.3. below, such cases are, in fact, applying the separate doctrine known as waiver by estoppel, because those courts concluded, or the parties thereto did not argue, that intent to waive is not clear.

Although the outcome may be similar, waiver and estoppel are founded on two different theories. The contractual doctrine of waiver rests on the idea that any competent adult can abandon a legal right and, if he does so, then he has lost it forever. *McElroy v BF Goodrich Co*, F3d 722, 724 (CA 7 1996). Conversely, the doctrine of estoppel "has its origin in moral duty and public policy; and its chief purpose is the promotion of common honesty, and the prevention of fraud." *Hassberger v Gen'l Builders Supply Co*, 213 Mich 489, 492-93 (1921).

Michigan courts have not addressed whether prejudice is required to show an express waiver of the right to arbitration. Consistent with the general rule governing waiver, courts from other jurisdictions that have engaged in a detailed analysis of the issue have held that prejudice is not required for a true waiver of a right to arbitration. For example, in Cabinetree of Wisconsin Inc v Kraftmaid Cabinetry Inc, 50 F3d 388 (CA 7 1995), plaintiff filed claims in state court. The defendant removed the case to federal court and commenced discovery before filing a motion to stay the case and compel arbitration. The district court held that, by electing to remove the case and pursue discovery, the defendant had waived its right to arbitration. In an opinion by Chief Judge Richard Posner, the Seventh Circuit Court of Appeals affirmed the District Court decision, noting that by removing the case to federal court without at the same time asking the district court for an order to arbitrate, the defendant "manifested its intention to resolve the dispute through the process of the federal court" and, therefore, waived its right to arbitration. Id. at 390. Critically, the Seventh Circuit Court of Appeals expressly held that prejudice was not required to establish waiver of a right to arbitrate. Id. at 390 (citing St Mary's Medical Center of Evansville, Inc v Disco Aluminum Prod Co, 969 F2d 585 (CA 7 1992)). In doing so, the court acknowledged that other courts sometimes required prejudice in assessing whether a waiver of the right to arbitration had occurred. However, the court held that prejudice was not required

because, under ordinary contract law, a waiver is effective without proof of consideration or detrimental reliance. *Id.* at 390 (citing E Allen Farnsworth, Contracts §8.5 (2d ed, 1990); 3A Corbin on Contracts §753 (1960)).

Importantly, given Defendants' repeated insistence that an arbitration clause is entitled to special treatment, the Seventh Circuit Court of Appeals held that the general policy favoring arbitration does not require that courts apply the rules of waiver differently when dealing with an arbitration provision:

In determining whether a waiver has occurred, the court is not to place its thumb on the scales; the federal policy favoring arbitration is, at least so far as concerns the interpretation of an arbitration clause, merely a policy of treating such clauses no less hospitably than other contractual provisions.

Id. at 390.

The Supreme Court of Appeals for West Virginia recently addressed the question of whether waiver of the right to arbitrate requires a showing of prejudice. In *Parsons v Halliburton Energy Servs Inc*, 785 SE2d 844 (WVa 2016), plaintiff sued his former employer for payment of his final wages. As its first court filing, defendant moved to compel arbitration. Notwithstanding that defendant raised the issue in its first court filing, plaintiff argued that defendant had waived its right to arbitration by not raising the arbitration clause earlier. The trial court held that plaintiff was required to prove that he had been prejudiced by the delay and granted defendant's motion to compel arbitration. *Id.* at 849. Although it affirmed the trial court's ruling on other grounds, the Supreme Court of Appeals for West Virginia expressly rejected the argument that plaintiff was not required to prove prejudice in order to show waiver of the right to arbitrate:

The right to arbitrate, like any other contract right, can be waived. To establish waiver of a contractual right to arbitrate, the party asserting waiver must show that the waiving party knew of the right to arbitrate and either expressly waived the right, or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language. There is no requirement that the party asserting waiver show prejudice or detrimental reliance

Id. at 853.

Numerous other courts have likewise recognized that an express waiver does not require prejudice. *See eg, Century Indemnity Co v Viacom Int'l Inc*, 2003 WL 402792, *4 (SDNY Feb 20, 2003) (unpublished case attached as Exhibit S) ("A party may expressly waive its right to arbitration, and if so, prejudice need not be shown."); *Triton Container Int'l Ltd v Baltic Shipping Co*, 1995 WL 729329 (ED La Dec 8, 1995) (unpublished case attached as Exhibit T) (if a party expressly waives arbitration, the opposing party should not have to show prejudice because the moving party has knowingly relinquished a contractual right); *Camp Ne'er Too Late LP v Swepi LP*, --- F Supp 3d ---, 2016 WL 2594186 (MD Pa May 5, 2016) (unpublished case attached as Exhibit U) (prejudice only required if not an express waiver); *Gonyea v John Hancock Mut Life Ins*, 812 F Supp 445 (D Vt 1993) (unlike estoppel, waiver does not necessarily imply that one has been misled to its prejudice). Additional cases⁶ in which the courts have held that prejudice is not required to show an express waiver of the right to arbitration are discussed in Nexteer's Answer at pages 17-18.

-

⁶ Gilmore v Shearson/American Express, Inc, 811 F2d 108, 112-13 (CA 2 1987) (prejudice not required for express waiver of arbitration); Apollo Theater Found Inc v W Int'l Syndication, 2004 US Dist LEXIS 11110, *8 (SDNY June 21, 2004) (unpublished case attached to Answer as Exhibit L) ("No showing of prejudice to the opposing party is necessary if a litigant has expressly waived its right to arbitration."); American Home Assurance Co v Fremont Indem Co, 1992 US Dist LEXIS 7512, *4-5 (SDNY May 29, 1992)(unpublished case, attached to Answer as Exhibit M) ("Prejudice need not be shown where there is an express waiver of the right to arbitrate.").

Accordingly, where the claim at issue is that a party made a true waiver of its right to arbitration, the party asserting the waiver need not show prejudice. All that must be shown is that the party claiming a right to arbitration intentionally relinquished or abandoned that right. 13 Williston on Contracts § 39:27 (4th ed); *Quality Prods & Concepts Co*, 469 Mich at 374; *Cabinetree of Wisconsin Inc*, 50 F3d 388; *Gilmore v Shearson/American Express, Inc*, 811 F2d 108, 112-13 (CA 2 1987); *Parsons*, 785 SE2d at 853; *Century Indemnity Co*, 2003 WL 402792 at *4.; *Apollo Theater Found Inc v W Int'l Syndication*, 2004 US Dist LEXIS 11110, *8 (SDNY June 21, 2004) (unpublished case attached to Answer as Exhibit L); *American Home Assurance Co v Fremont Indem Co*, 1992 US Dist LEXIS 7512, *4-5 (SDNY May 29, 1992)(unpublished, attached to Answer as Exhibit M).

2. Courts That Have Required Prejudice Actually Are Applying Waiver By Estoppel

Despite multiple rounds of briefing, Defendants have not identified a single case in which a party made an express waiver that a court declined to enforce due to lack of prejudice. Nexteer does not dispute that there are decisions by the Michigan Court of Appeals and various federal courts in the implied waiver context suggesting that prejudice is required in order to show waiver of a right to arbitration. However, a close examination of such decisions reveals that these cases involve the doctrine of waiver by estoppel, not express waiver. Furthermore, many such statements were made only in *dicta*.

The distinction between express waiver and waiver by estoppel has been acknowledged as a source of confusion for some courts. The Supreme Court of Appeals for West Virginia recently noted that courts often conflate the distinct doctrines of waiver and estoppel. "[T]he doctrine of waiver is sometimes confused with the doctrine of estoppel, particularly on the question of prejudice and detrimental reliance. The result is that 'the terms 'waiver' and

'estoppel' have often been used without careful distinction, and thereby abused and confused.'"

Parsons, 785 SE2d at 851 (quoting Salloum Foods & Liquor Inc v Parliament Ins Co, 69 Ill App 3d 422, 388 NE2d 23, 27 (1979)). See also Evelyn v Raven Realty Inc, 215 Md 467, 138 A2d 898 (1958) ("There is even confusion in the use of the terms 'waiver' and 'estoppel.' Many law writers and courts make no effort to distinguish them and use the terms interchangeably."); George Smith and Thomas Hall, Critical Distinctions Between Waiver and Estoppel, 244 NYLJ No 117, (attached as Exhibit V). Such confusion is understandable in the context of whether an arbitration provision has been waived given that (unlike the dispute at hand) such cases rarely involve an express statement waiving arbitration.

i. Michigan Courts Do Not Require Prejudice For An Express Waiver

Defendants rely primarily on four Michigan Court of Appeals cases to support their argument that prejudice is required for a waiver of a right to arbitration. (Application p 25). However these cases do not hold up to scrutiny. Not one of the cases involved an express waiver of arbitration and, in many cases, statements that prejudice was required are limited to *dicta*.

In *Kauffman v The Chicago Corporation*, 187 Mich App 284 (1990), the Michigan Court of Appeals stated that a party arguing there has been a waiver of the right to arbitration "must demonstrate knowledge of an existing right to compel arbitration, acts inconsistent with the arbitration right, and prejudice to the party opposing arbitration resulting from the inconsistent acts." *Id.* at 292 (citing *Fisher v AG Becker Paribus, Inc*, 791 F2d 691 (CA 9 1986)). However, by looking to whether prejudice has occurred, the standard articulated by the court is the standard for waiver by estoppel, not express waiver. 13 Williston on Contracts § 39:28 (4th ed) ("Unlike waiver by estoppel...which depends on...on the reliance of the nonwaiving party, a true waiver...is dependent solely on what the party charged with waiver intends to do, and there is no

need to show reliance by the party asserting or claiming the waiver."). Furthermore, any statements by the court regarding the need for prejudice must be considered *dicta* because they did not form the basis of the court's ruling that arbitration had not been waived. Rather, the court held that plaintiff had not shown the defendants acted inconsistently with their right to arbitration, and therefore not demonstrated an intent to waive arbitration. *Kauffman*, 187 Mich App at 292. The court did not base its ruling on a lack of prejudice. *Id*.

In *Burns v Olde Discount Corporation*, 212 Mich App 576 (1995), the Court of Appeals referenced the statements in *Kauffman* regarding the need to show an existing right to compel arbitration, acts inconsistent with the arbitration right, and prejudice to the party opposing arbitration resulting from the inconsistent acts. *Burns*, 212 Mich App at 582 (citing *Kauffman*, 187 Mich App at 292)). Like the decision in *Kauffman*, the statements in *Burns* regarding the need for prejudice are limited to *dicta*. The court did not reach the issue of prejudice because it ruled that the defendant had not acted inconsistently with its right to arbitrate. *Id.* at 583. Neither *Burns* nor *Kaufman* involved an express waiver of the right to arbitrate or indicia of an intent to relinquish any such right.

Madison District Public Schools, 247 Mich App 583 526 (2001) is the only case upon which Defendants have relied in which the Court of Appeals reached the issue of prejudice. The Court of Appeals found that the plaintiff had waived its right to arbitration and reversed the Circuit Court decision compelling arbitration. *Id.* at 601. In doing so, the Court of Appeals applied a standard stated in *Burns* and *Kauffman* that required defendant to show prejudice. *Id.* at 529. However, as noted above, this articulation of the standard for waiver actually applies to a waiver by estoppel, not express waiver. 13 Williston on Contracts § 39:28 (4th ed). Appropriately, the basis for the alleged waiver in *Madison District Public Schools* was not an

express statement by the plaintiff. Plaintiff argued, and the Court of Appeals agreed, that the defendant had waived its right to arbitration by availing itself of the litigation to obtain discovery and dismissal of a portion of plaintiff's complaint. *Id.* at 533-34.⁷ Thus, *Madison District Public Schools* did not involve an express waiver and the standard applied in *Madison District Public Schools* is not applicable to whether Mando made an express waiver of any right to arbitration that it otherwise might have had.

Finally, Defendants rely on the unpublished case of *Coon v Gilbert*, Docket No 324463, 2010 Mich App LEXIS 368, Docket No 324463 (Feb 23, 2010) (unpublished case attached to Application as Exhibit A). Like the circumstances in *Madison District Public Schools*, *Coon* did not involve claims that the party had expressly waived its right to arbitration. Rather, *Coon* involved claims that a party had waived its right to arbitration based actions it had taken in the litigation that allegedly resulted in prejudice. 2010 Mich App LEXIS 368 at *4. Thus, *Coon*, and the other Michigan cases upon which Defendants rely, must be understood as applying the doctrine of estoppel by waiver, not express waiver.

ii. Other Courts Do Not Require Prejudice For An Express Waiver

Defendants cite several cases from various federal courts and other jurisdictions for the boilerplate argument that waiver of a right to arbitration requires prejudice. Like the Michigan cases upon which Defendants rely, these cases did not involve an express waiver. The only cases

25.

13

substantial portion of Nexteer's claims before moving to compel arbitration. See Answer pp 24-

⁷ The Court of Appeals in *Madison* is particularly notable for its holding that dismissal of a portion of plaintiff's claims was unequivocally prejudice sufficient to support a finding of waiver. *Id.* at 599-600. If the Court determines that prejudice is required to show waiver, Defendants' reliance on *Madison* supports Nexteer's position that it was prejudiced by Defendants' actions in availing themselves of the Circuit Court to obtain dismissal of a

identified by Defendants as suggesting that courts should not distinguish between express and implied waiver did so in *dicta*.

Defendants place a great deal of emphasis on the Ninth Circuit Court of Appeals' decision in Van Ness Townhouses v Mar Indus Corp, 862 F2d 754 (1988). In particular, Defendants point to statements by the Ninth Circuit Court of Appeals that the so called "Fisher test" requiring prejudice to show waiver of a right to arbitrate, as identified in Fisher v AG Becker Paribas Inc, 791 F2d 691 (CA 9 1986), applies to both express and implied waiver. (Def Supp Br p 20). Defendants' reliance on such statement is misplaced for a number of reasons. First, the statement is, at best, dicta. In Van Ness Townhouses, the Ninth Circuit Court of Appeals first held that the parties never agreed to arbitrate the dispute. Therefore, it was not necessary to reach the issue of waiver and the court's waiver discussion was superfluous. Id. at 759 ("The district court erred in granting [defendant's] motion to compel arbitration because the parties never agreed to arbitrate those claims, and could not do so under the law existing at the time they signed the arbitration agreement. While we need not reach the issue of waiver of arbitration..."). Second, Van Ness Townhouses is flawed, and should have no persuasive value, because it fails to analyze the distinction between an express waiver and a waiver by estoppel recognized in the later decisions discussed in Section III.A.1. above.

Defendants also rely on a decision by the Connecticut Supreme Court in *MSO*, *LLC* v *DeSimone*, 94 A3d 1189 (Conn 2014). Defendants argue that, in *MSO*, *LLC*, the Connecticut Supreme Court provided that, for both express and implied waiver, a party must show prejudice. (Def Supp Br p 21). While it is true that *MSO*, *LLC* contains a discussion of the need for prejudice, nowhere does the Connecticut Supreme Court make the leap of stating that prejudice is required for both an express and an implied waiver. In fact, the circumstances at issue in

MSO, LLC, did not involve an express waiver. They involved a simple issue of whether the defendants had implicitly waived arbitration by proceeding with litigation for several years. *Id.* at 1193. The Connecticut Supreme Court did not reach the ultimate issue of waiver, and held only that the trial court erred in finding that plaintiff's waiver argument was unavailable as a matter of law and remanded for determination whether a waiver occurred. *Id.* at 65.

Last, Defendants point to two unpublished Federal District Court decisions, US Fire Ins Co, No 96-cv-8409, 1997 WL 45041 (ED Pen, Jan 30 1997) and McLaughlin v CSX Transportation Inc, No 3:06CV-154, 2008 WL 3850709 (Aug 14, 2008), as declining to distinguish between express and implied waiver for purposes of whether a party waived Neither case actually involved an express waiver and neither case supports arbitration. Defendants' argument. In US Fire Ins, the court simply made a boilerplate reference to two separate cases, one noting that waiver could be express or implied and one suggesting that waiver should not be "inferred" unless the party asserting waiver has been prejudiced. 1997 WL 45041 at *1. The court never connected these two arguments and never reached the issue of prejudice, noting only that "there simply is no undisputed evidence to support the claim that defendant expressly waived her right to arbitration. Neither had plaintiff demonstrated that defendant's acts or language are inconsistent with defendant's goal of resolving the coverage dispute through arbitration." Id. Similarly, in McLaughlin, the court made general reference to the rule that waiver can be express or implied, before noting that "[third-party defendant] never expressly waived its contractual right to arbitrate." 2008 WL 3850700 at * 1. Furthermore, the court went on to conclude that arbitration had been waived by reason of delay without directly addressing whether the party asserting waiver had shown prejudice. *Id.*

This Court should cut through the confusion regarding the different forms of waiver. As noted above, the cases relied upon by Defendants are properly understood as applying the doctrine of waiver by estoppel, not express waiver. This standard only need be applied when there is insufficient evidence of an intent to relinquish a contractual right. circumstances, which do not exist here, courts apply waiver by estoppel because of the harm suffered by the other party. Smith and Hall, supra p 2 ("Estoppel, on the other hand, usually does not require examination of a party's intent. Instead, the equitable doctrine of estoppel looks to whether the party asserting estoppel would otherwise suffer a detriment based on the conduct of the other party."). Any statement in these cases regarding the need for prejudice is not relevant to Nexteer's argument that Defendants made an express waiver of any right to arbitration. As discussed in greater detail above, prejudice is not required to show an express waiver (or a true waiver implied from other conduct). Williston on Contracts § 39:27 (4th ed); Quality Prods & Concepts Co, 469 Mich at 374; Cabinetree of Wisconsin Inc, 50 F3d 388; Gilmore, 811 F2d at 112-13; Parsons, 785 SE2d at 853; Century Indemnity Co, 2003 WL 402792 at *4; Apollo Theater Found Inc, 2004 US Dist LEXIS 11110, *8; American Home Assurance Co, 1992 US Dist LEXIS 7512 at *4-5. Prejudice only is required in cases in which the party claiming the right to waiver did not intend to waive its right to arbitration, but the prejudice resulting from such party's actions justifies waiver under principles of estoppel. Williston on Contracts § 39:28 (4th ed).

B. Defendants' Stipulation To The Case Management Order In This Case Is An Express Waiver Of Any Right To Arbitrate That Otherwise May Have Existed

Defendants expressly waived any argument that they are entitled to arbitration when they agreed in the CMO that the arbitration provision now at issue is not applicable to this case. As

noted by the Court of Appeals, "[a] waiver is an intentional relinquishment [or] abandonment of a known right." Exhibit J, p 3; see also, Quality Prods & Concepts Co, 469 Mich at 374. The same standard applies to waiver of a right to arbitration. Parsons, 785 SE2d at 853 (waiver of the right to arbitrate requires that "the waiving party knew of the right to right to arbitrate and either expressly waived the right or, based on the totality of the circumstances, acted inconsistently with the right to arbitrate through acts or language.").

1. Mando Was Aware Of The Arbitration Provision

Mando does not dispute that it was fully aware of the arbitration provision, and its alleged connection to this dispute, from the outset of this case. In the CMO, the parties checked the box confirming that "[a]n agreement to arbitrate this controversy" "exists" but that it "is not applicable."

Arbitration

17. Arbitration [MCL 691.1681 et seq., MCR 3,602]; An agreement to arbitrate this controversy ☐ does not exist ☐ is unknown ☒ exists ☐ is/will be the subject of a timely motion ☐ is waived ☒ is not applicable

Answer, Exhibit D.

2. By Agreeing To The CMO, Mando Expressed Its Intention To Relinquish Or Abandon A Claim For Arbitration

Whether the Court of Appeals called Defendants' actions a stipulation, affirmation, admission, agreement, or representation, does not really matter. What is important is that Defendants knew an "agreement to arbitrate this controversy" existed, represented to the Circuit Court and the parties that it did not apply, and this representation was made part of an order. *See Awanderlust Travel Inc v Kochevar*, 21 P3d 876, 878 (Colo Ct App 2001) ("When no objection is made to a pre-trial order, the matters determined by the order have the force and effect of a stipulation among the parties.").

Defendants argue that because the box checked on the CMO states that the arbitration provision "is not applicable," as opposed to "waived," that this is dispositive evidence that no waiver occurred. Defendants' Reply In Support of Application For Leave to Appeal, p 3. However, this argument takes an overly simplistic view. A true waiver does not require the invocation of any magic words. *See Amalgamated Transit Union v Southeastern Mich Traps Auth*, 437 Mich 441, 463 n 16 (1991) (the word "waiver" is not required to waive a right, even when the standard requires "clear and unmistakable" evidence of waiver). It is sufficient that a party's statements and actions demonstrate an intention not to proceed with arbitration. *Parsons*, 785 SE2d at 853; *see also Johnston v Manhattan Fire & Marine Ins Co*, 294 Mich 550, 556 (1940) (waiver may be made by acts and conduct manifesting an intent not to claim right).

Here, by stipulating in the CMO that the "agreement to arbitrate this controversy" did not apply to the dispute, Defendants made and expressed a decision that they would proceed with litigation and would not pursue arbitration. This is sufficient to show a waiver. *Cabinetree of Wisconsin Inc*, 50 F3d at 390; *Parsons*, 785 SE2d at 853; *see also*, *Johnston*, 294 Mich at 556. The Court of Appeals merely enforced Defendants' original election not to pursue arbitration.

3. Defendants' Waiver Was Not "Preliminary"

Defendants and Amicus Curiae argue that Defendant should be relieved of the consequences of their waiver because the CMO only was a "preliminary" statement of the parties' positions. These arguments are without merit.

i. Parties Can Waive Rights In A Case Scheduling And Management Orders

As an initial matter, there is nothing inherent in the nature of the CMO that precludes it from being a waiver. Courts regularly hold that the representations and elections that a party makes in stipulated procedural orders constitute a waiver of any rights or arguments inconsistent

with the agreed order.⁸ For example, in *Lending Tree LLC v Anderson*, 747 SE2d 292, 298 (NC Ct App Aug 5, 2013), the court held that defendant waived his objections to venue when he failed to object to a case management order stating that "venue is proper in this action." *Id.* at 298.

In West Ridge Group LLC v First Trust Co of Onaga, 2008 WL 5156437 (D Colo Dec 9, 2008) (unpublished case attached as Exhibit W), aff'd, 414 Fed Appx 112 (CA 10 2011), the parties agreed to a scheduling order stating that they expected a "3-5 day bench trial." Eight months later, plaintiff filed a notice of demand for jury trial. The court found that the plaintiff deliberately and expressly waived its right to a jury and that plaintiff's late request for a jury was based "on an apparent change in strategy." Id. at *2-3.

Similarly, in *Power v Tyco Int'l (US) Inc*, 2006 WL 1628588 (SDNY 2006) (unpublished case attached as Exhibit X), the court found that a joint case management plan constituted an express waiver of a jury trial. "The parties' formal proposal to the Court, and the Court's acceptance, of a [case management plan] providing for a non-jury trial constitutes an express waiver of a jury trial. The very purpose of including such a term in the Court's standard form CMP is to eliminate later litigation about trial issues by either securing the parties' agreement about how a case is to be tried or at least surfacing disagreement at an early stage of the case." *Id.* at *3-4. Notably, in not one of the cases cited above did the court suggest that prejudice was required to enforce the waiver.

Indeed, courts have enforced other modifications to contractual rights made in far less formal documents than the CMO. *See*, eg, *Bailey v Kerns*, 431 SE2d 312, 313-14 (Va 1993) (will

⁸ Defendants' reliance on *In re Charter Behavioral Health Sys, LLC*, 277 BR 54 (Bankr D Del 2002) and *Report of the Caseflow Management Rules Committee*, 435 Mich 1210 (1990), to support the preliminary nature of the CMO pursuant to MCR 2.401, is unavailing for the reasons set forth in Nexteer's prior briefing. Answer, pp 20-21.

handwritten on back of a hardware store receipt); *Trim v Daniels*, 862 SW2d 8, 9 (Tex Ct App 1992) (will written in greeting card); *CX Digital Media v Smoking Everywhere*, No 09-62020-CIV, 2011 WL 1102782 (SD Fla Mar 23, 2011) (Unpublished case attached as Exhibit Y) (contract modified through instant messaging conversation).

Defendants point to a single case, *In re Charter Behavioral Health Sys, LLC*, 277 BR 54 (Bankr D Del 2002), in which the bankruptcy court found that defendants had not waived their right to arbitration based on statements in a preliminary scheduling order. However, the language at issue in *In re Charter Behavioral Health Sys* was significantly different than the representations agreed to here by Defendants. Unlike the language in the CMO, which made express representations regarding a known arbitration provision, the scheduling order at issue in *In re Charter Behavioral Health Sys* contained only a generic statement that "the parties have determined after discussion that the matter cannot be resolved at this juncture by settlement, voluntary mediation, or binding arbitration." *Id.* at 58. Such statement properly is understood as referring to future options for alternative dispute resolution, not an existing arbitration provision on which a party intends to rely for its defense. Accordingly, Defendants' representations and agreement in the CMO is properly considered an express waiver.

ii. Waiver Of Rights Based On Representations And Agreements In A Case Management Order Is Not "Unfair"

Amicus Curiae suggests that allowing a waiver of the right to arbitrate based on statements made in an early case management order somehow would be unfairly prejudicial to defendants in litigation across the state. However, this argument ignores the fact that contracting parties are free to waive their rights at any time, including before a lawsuit is filed. For example, if Mando had written an email to Nexteer pre-litigation agreeing that the NDA would not apply to this dispute that would have been an effective waiver. Surely, a court order, agreed upon after

review and presumably advice by Mando's counsel, therefore should be given effect. There is no basis in law or court rule for Amicus Curiae's suggestion that there must be some preliminary grace period after filing of a lawsuit in which parties cannot waive their rights or claims. To the contrary, Michigan Court Rules require parties to make decisions regarding what defenses they wish to raise at the initial pleading stage. MCR 2.116(D)(1) and (D)(2) provide that all of the following defenses (and more) are waived if they are not raised in a party's first responsive pleading: (a) personal jurisdiction; (b) service of process; (c) subject matter jurisdiction; (d) prior release; (e) immunity granted by law; (f) an agreement to arbitrate; or (g) statute of limitations. Therefore, if an omission constitutes a waiver of a right to arbitrate, clearly an express representation in a court order that while "agreement to arbitrate this controversy" exists but it will not be pursued, must have the same binding effect.

Finally, waiver of claims related to the forum in which the matter will be litigated, including any claim for arbitration, is consistent with the purpose of a case management order. In fact, identifying the appropriate forum at the beginning of the case is one of the primary purposes of the CMO, and undoubtedly why arbitration was one of the key subject areas in the CMO. *See West Ridge Group LLC*, 2008 WL 5156437 at *3 ("the very purpose of including [a waiver of jury trial provision] in the Court's standard [case management plan] is to eliminate later litigation about trial issues by securing the parties' agreement to how a case is to be tried or at least surfacing disagreement at an early stage of the case.") In order for a court to proceed with a case, the court must be able to address any arguments that the matter should be litigated in a forum other than the current court. The elections made by the parties must be binding. To hold otherwise would open the door for abuse, allowing parties multiple "bites at the apple" by raising issues in one court and then seeking to change the forum if they do not like the result. Such a

rule also is consistent with promoting judicial economy and efficient resolution of disputes. Parties make decisions at the outset of a case regarding where the matter will be litigated. It is highly inefficient, and unfair, for one party to decide six months or a year later that it actually wishes to utilize a different forum instead. Thus, there is nothing inherent in the nature of a case management order that precludes a party from waiving its rights based on representations and agreements made in the order.

iii. Defendants' Statement In The CMO Regarding Arbitration Was Not "Preliminary"

Turning to the CMO at issue in this case, Defendants and Amicus Curiae argue that the order itself states that it only is a preliminary statement of the parties' positions. However, this argument is based on a misreading of the CMO. The language upon which Defendants and Amicus Curiae rely is contained in the preamble to the CMO and states as follows: "The court having conducted a case management conference with each party/attorney; *and the court being preliminarily advised of the following*:". Answer, Exhibit D p 1 [emphasis added]. The statement, understood in context, is referring only to the descriptions of the claims and defenses that immediately follow this statement and that make up the rest of the preamble.

The court having conducted a case management conference with each party/attorney; and the court being preliminarily advised of the following:

Primary Claim(s): breach of employment/confidentiality agreement and/or nonsolicitation agreement, and misappropriation of trade secrets (together with other claims)

Relief Requested: (A) an injunction enjoining defendants from (I) using or disclosing plaintiff's confidential/proprietary information and/or trade secrets, and (II) soliciting plaintiff's employees, and (B) money damages

Primary Defense(s): defendants have not breached any duty

Admissions / Stipulations (facts and/or documents): nothing at this time

IT IS ORDERED:

Id.

In contrast, the agreed upon statement that the arbitration provision is not applicable is located on the bottom of the following page. *Id.* at p 2. It is not part of the preamble. *See In re CMGT Inc*, 424 BR 355 (ND III 2010) (distinguishing between preamble and main body of order after words "IT IS HEREBY ORDERED"). In fact, it is contained in a separate section of the CMO separated from the preamble by the operative language of the CMO "IT IS SO ORDERED."

The Circuit Court itself rejected Defendants' argument and noted that the CMO was intended to cover the entire case, not just the preliminary stages:

[T]h CMO, quite intentionally, occurs in the early stages of litigation. However, as contemplated by MCR 2.401, it is intended to facilitate the long-term progress of the case. By opening the document with the "court being preliminarily advised of the following", the court did not make a "preliminary" order but, rather, merely documented the parties' "preliminary" statement of their claims, defenses, relief requested, and stipulated facts/documents, that then formed the foundation of the following court orders. (Answer, Exhibit E p 11).

Thus, there is nothing "preliminary" about the Defendants' waiver of any argument that they are entitled to arbitration.

4. Defendants' Statement In The CMO Regarding Arbitration Was Not Limited To Nexteer's Request For Injunctive Relief

Defendants' argument that its agreement that the arbitration provision is "not applicable" was limited to Nexteer's request for injunctive relief, is without merit. As an initial matter, when it entered the CMO on November 25, 2013, the Circuit Court already had denied Nexteer's motion for preliminary injunctive relief. Exhibit Z. Defendants made no argument to the Circuit Court that their statement in the CMO was so limited. Answer, Exhibit K. Moreover, from the

beginning of the case, Nexteer sought monetary damages along with injunctive relief.⁹ If Defendants truly intended for their statement to be limited to Nexteer's request for a preliminary injunction, they easily could have stated that arbitration was not applicable to the preliminary injunction but then governed the remainder of the dispute. Further, Defendants could have marked the box indicating that the provision "is/will be the subject of a timely motion." They did not. Answer, Exhibit D. Defendants could have (and under the Michigan Court Rules were required to) list the arbitration provision in their affirmative defenses. They did not. Answer, Exhibit F. All of Defendants' actions clearly evidence an intent not to pursue arbitration for any portion of the dispute, not just Nexteer's request for a preliminary injunction.

5. Facts Supporting Defendants' Waiver Are Not Limited To The CMO

Although the Court of Appeals held that the CMO was, standing alone, sufficient to establish a waiver, the analysis of whether Defendants waived the right to arbitration is not so limited. The question is whether Defendants, by their express statements *and/or their actions*, evidenced an intent to abandon or relinquish any right to arbitration that otherwise might have existed. 13 Williston on Contracts § 39:27 (4th ed); *Parsons*, 785 SE2d at 853.

Although the Court of Appeals did not find it necessary to reach such issues, the actions taken by Defendants that are inconsistent with the right to arbitrate further support the fact that Defendants made an intentional decision to pursue litigation instead of asserting a right to arbitration. Such actions include failing to raise the issue of arbitration in any of their pleadings

Motion to Dismiss, Defendants included substantive analysis of the actual Employment Agreements at issue that went well beyond a preliminary injunction analysis.

⁹ Even in pleadings subsequent to the CMO, including in their Answer to the Complaint and their Motion to Dismiss, Defendants made it clear that this case was about more than a preliminary injunction and yet failed to raise their alleged right to arbitrate. For example, one of Defendants' affirmative defenses was that equitable relief was not appropriate because Nexteer could be "adequately compensated by damages." *See* Answer Exhibit F, p 32. Additionally, in their

or briefs for the first six months of the lawsuit, serving discovery, filing a motion to dismiss the

entire case, and obtaining a judicial order dismissing (in whole or in part) seven out of the nine

counts in Nexteer's complaint. An election by a party to proceed before a nonarbitral tribunal

for the resolution of a contractual dispute is a presumptive waiver of the right to arbitrate.

Cabinetree of Wisconsin Inc, 50 F3d at 390.

IV. **CONCLUSION**

For the reasons stated above, Nexteer respectfully requests that this Court deny

Defendants' Application for Leave to Appeal.

Respectfully submitted,

FOLEY & LARDNER LLP

/s/ John F. Birmingham, Jr.

John F. Birmingham Jr. (P47150)

John R. Trentacosta (P31856) Nicholas J. Ellis (P73174)

500 Woodward Avenue, Suite 2700

Detroit, MI 48226-3489

Telephone: (313) 234-7100

Facsimile: (313) 234-2800

Dated: December 14, 2016

PROOF OF SERVICE

The undersigned hereby certifies that on December 14, 2016, a copy of the foregoing Plaintiff-Appellee Nexteer Automotive Corporation's Supplemental Brief in Opposition to Defendants-Appellants' Application for Leave to Appeal was served on all counsel of record, through the Court's electronic filing system and/or by first class mail, addressed as follows:

Shea Aiello & Doxsie PLLC David J. Shea 26200 American Drive, Third Floor Southfield, MI 48034

Giarmarco Mullins & Horton PC Andrew T. Baran William H. Horton 101 W. Big Beaver Road, Tenth Floor Troy, MI 48084-5280

Braun Kendrick Finkbeiner PLC C. Patrick Kaltenbach 4301 Fashion Square Blvd. Saginaw, MI 48603 Telephone (989) 498-2100

Cohen & Gresser LLP Alexandra S. Wald Mark D. Spatz Sang Min Lee 800 Third Ave., 21st Floor New York, New York 10022

Plunkett Cooney, P.C. Mary Massaron (P43885) 38505 Woodward Ave., Suite 2000 Bloomfield Hills, MI 48304 (313) 983-4801

/s/ John F. Birmingham, Jr. John F. Birmingham, Jr.

Exhibit R

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

NEXTEER AUTOMOTIVE,

a Delaware corporation,

Plaintiff,

١,

Case No. 13-021401-CK-1 HON. M. RANDALL JURRENS

MANDO AMERICA CORPORATION, a Michigan corporation, et al,

Defendants.

MILLER, CANFIELD, PADDOCK and STONE, P.L.C.

RICHARD W. WARREN (P63123)

JEROME R. WATSON (P27082)

SONI MITHANI (P51984)

Attorneys for Plaintiff Nexteer Automoti

Attorneys for Plaintiff Nexteer Automotive 150 West Jefferson, Suite 2500 Detroit, MI 48226 (313) 963-6420

BRAUN KENDRICK FINKBEINER, PLC C. PATRICK KALTENBACH (P15666)
Attorneys for Individual Defendants
4301 Fashion Square Boulevard
Saginaw, MI 48603
(989) 498-2100

GIARMARCO, MULLINS & HORTON, P.C. ANDREW T. BARAN (P31883)
WILLIAM H. HORTON (P31567)
Attorneys for Defendant Mando America
Corporation
101 W. Big Beaver Road – Tenth Floor
Troy, MI 48084-5280
(248) 457-7000

SHEA AIELLO & DOXSIE, PLLC DAVID J. SHEA (P41399)
Attorneys for Individual Defendants 26200 America Dr., Fl. 3
Southfield, MI 48034
(248) 354-0224

DEFENDANTS' FIRST DISCOVERY REQUESTS TO PLAINTIFF

NOW COME Defendants and, pursuant to MCR 2.309 and 2.310, request

Plaintiff to answer the following discovery requests in writing and under oath:

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

1. With respect to Tony Dodak,

- a. Identify with specificity each trade secret, creation or item of confidential or proprietary information ("Alleged Trade Secret") which you contend was misappropriated, used, discussed or disclosed or in any way improperly taken ("Allegedly Misappropriated" or "Alleged Misappropriation") by him;
- b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
- c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

ANSWER:

- 2. With respect to Abraham Gebregergis,
 - **a.** Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an

Fenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

ANSWER:

- 3. With respect to Ramakrishnan Rajavenkitasubramony,
 - **a.** Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

- 4. With respect to Christian Ross,
 - **a.** Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly

Misappropriated, i) state <u>with specificity</u> all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.

c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

ANSWER:

- 5. With respect to Kevin Ross,
 - a. Identify with specificity each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

- 6. With respect to Tomy Sebastian,
 - a. Identify with specificity each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

- 7. With respect to Theodore G. Seeger,
 - a. Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state <u>with specificity</u> all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

ANSWER:

- 8. With respect to Troy Strieter,
 - **a.** Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

- 9. With respect to Jeremy J. Warmbier,
 - **a.** Identify <u>with specificity</u> each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the

Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) 🕁 produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

ANSWER:

- 10. With respect to Scott Wendling,
 - a. Identify with specificity each Alleged Trade Secret which you contend was Allegedly Misappropriated by him;
 - b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
 - c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name. address and position or title of each person who has personal knowledge of the facts in your answer.

- 11. With respect to Mando America Corporation,
 - a. Identify with specificity each Alleged Trade Secret which you contend was Allegedly Misappropriated by it;

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

- b. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, i) state with specificity all facts showing the Alleged Misappropriation, ii) produce all documents supporting your answer and iii) identify by name, address and position each person who has personal knowledge of the facts in your answer.
- c. For each Alleged Trade Secret which you contend was Allegedly Misappropriated, state with specificity i) a complete description of the Alleged Trade Secret, including a complete factual description of it, when it was created and by whom, and how and when it was identified as an Alleged Trade Secret ii) the efforts taken by you to maintain its secrecy, iii) produce all documents supporting your answer and iv) identify by name, address and position or title of each person who has personal knowledge of the facts in your answer.

ANSWER:

12. Do you contend that Mazin-James Khlaif, Shakil Hossain, Mazharul Chowdhury, Suhas Jagtap or Reeny Sebastian Allegedly Misappropriated any Alleged Trade Secret? If so, for <u>each person</u> and <u>each Alleged Trade Secret</u>, a) describe <u>with specificity</u> the Alleged Trade Secret which you contend was Allegedly Misappropriated by that person, b) state <u>with specificity</u> all facts showing the Alleged Misappropriation, c) produce all documents supporting your answer and d) identify by name, address and position all persons who have personal knowledge of the facts in your answer.

<u>ANSWER</u>:

13. Produce all patents owned or licensed by or assigned to Plaintiff related to electric power steering.

ANSWER:

- 14. Does Plaintiff have a procedure to designate information as confidential or a trade secret? If so:
 - a. Produce a copy of any written procedure and the names and titles of each person involved in determining whether Plaintiff's information is a trade secret from 2009 to the present;
 - b. Produce a copy of any documents showing that any of the Alleged Trade Secrets were considered under the procedure at any time and, if so, which ones and the outcome.
 - c. Identify by name, address and position or title all persons with personal knowledge of the facts in your answer.

ANSWER:

- 15. Does Plaintiff have a list, compendium, database or other compilation identifying its confidential information or trade secrets? If so:
 - **a.** Produce a copy of the list, compendium, database or other compilation;
 - **b.** Identify when each item on the list was placed on the list;
 - c. Identify all witnesses with personal knowledge regarding or related to the list and provide their contact information.

16. Produce the complete personnel file of Tony Dodak, Abraham Gebregergis, Ramakrishnan Rajavenkitasubramony, Christian Ross, Kevin Ross, Tomy Sebastian, Theodore G. Seeger, Troy Strieter, Jeremy J. Warmbier, and Scott Wendling.

ANSWER:

GIARMARCO, MULLINS & HORTON, P.C.

By:

WILLIAM H. HORTON (P31567) ANDREW T. BARAN (P31883)

Attorneys for Defendant Mando America Corporation

101 West Big Beaver Road, Tenth Floor Troy, Michigan 48084-5280 (248) 457-7000

SHEA AIELLO & POXSJE, PLLC

By:__

DAVID J. SHE (P4/1399)

Attorneys for Individual Defendants

26200 America Dr., Fl. 3

Southfield, Michigan 48034

(248) 354-0224

BRAUN KENDRICK FINKBEINER PLC

By:

C PATRICK KALTENBACH (P15666)

Co-Counsel for Individual Defendants

4301 Fashion Square Boulevard

Saginaw, Michigan 48603

(989) 498-2100

Date: February 28, 2014

GIARMARCO, MULLINS & HORTON, P.C.

Tenth Floor Columbia Center ▼ 101 West Big Beaver Road ▼ Troy, Michigan 48084-5280 ▼ P: (248) 457-7000 ▼ F: (248) 457-7001 ▼ www.gmhlaw.com

CERTIFICATE OF SERVICE
The undersigned states that the within documents/pleadings were served upon the parties and/or attorneys of record at their addresses of record on
Via: First Class Mail Facsimile
I declare that the above statements are true to the best of my knowledge, information and belief.

Exhibit S

2003 WL 402792 Only the Westlaw citation is currently available. United States District Court, S.D. New York.

CENTURY INDEMNITY COMPANY et al., Petitioners,

v.

VIACOM INTERNATIONAL, INC., Respondent.

No. 02 Civ. 2779(DC). | Feb. 20, 2003.

Insurer petitioned to compel insured to arbitrate their insurance coverage dispute pursuant to arbitration clause of settlement agreement between the parties. On insured's motion to dismiss or stay petition, the District Court, Chin, J., held that: (1) issue of whether dispute was arbitrable under agreement was for court to decide; (2) dispute was arbitrable under agreement; and (3) insurer did not expressly or impliedly waive its contractual right to arbitrate dispute by its participation in insured's state court declaratory judgment action.

Motion denied, and petition granted.

West Headnotes (4)

[1] Insurance

Disputes and Matters Arbitrable

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)7 Arbitration

217k3271 Agreements to Arbitrate

217k3277 Disputes and Matters Arbitrable

Issue of whether insurance coverage dispute was arbitrable, pursuant to arbitration clause in settlement agreement between insurer and insured, was for district court to decide, since arbitration clause in agreement did not provide clear and unmistakable evidence referring matter of arbitrability to arbitrator. 9 U.S.C.A. § 4.

1 Cases that cite this headnote

[2] Insurance

Disputes and Matters Arbitrable

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)7 Arbitration

217k3271 Agreements to Arbitrate

217k3277 Disputes and Matters Arbitrable

Arbitration clause, providing that any dispute or claim in any way arising out of settlement agreement between insurer and insured was arbitrable, extended to insured's claim for coverage under renewal policy which allegedly had identical policy number as that mentioned on face of agreement; clause was susceptible to interpretation that it covered disputes related to other theoretically distinct policies with identical number.

Cases that cite this headnote

[3] Insurance

Waiver or Estoppel

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)7 Arbitration

217k3270 Waiver or Estoppel

Insurer did not expressly waive its contractual right, pursuant to settlement agreement, to arbitrate insurance coverage dispute with insured, even though insurer did not specifically include arbitration provision as affirmative defense to insured's state court declaratory judgment action, and insurer certified to state court that no arbitration was contemplated; insurer included in its answers affirmative defense of prior settlement and release, and insured's initial complaints acknowledged settlement agreement, and asserted no coverage that would conflict with it

1 Cases that cite this headnote

[4] Insurance

Waiver or Estoppel

217 Insurance

217XXVII Claims and Settlement Practices

217XXVII(B) Claim Procedures

217XXVII(B)7 Arbitration

217k3270 Waiver or Estoppel

Insurer did not constructively waive its right, under settlement agreement, to arbitrate insurance coverage dispute with insurer, by engaging in protracted litigation in state court action that prejudiced insured; although state action was filed more than two years earlier, it was still in its early stages, no substantive motions had been noticed, and insured's voluntary exchange of documents with insurer did not prejudice it.

1 Cases that cite this headnote

Attorneys and Law Firms

Nixon Peabody LLP, By: Frank W. Ryan, Robert F. Reklaitis, Laurin H. Mills, New York, New York, for Petitioners.

Paul, Weiss, Rifkind, Wharton & Garrison, By: Allan J. Arffa, Leslie Gordon Fagen, New York, New York, for Respondent.

MEMORANDUM DECISION

CHIN, J.

*1 In this diversity case, petitioners Century Indemnity Company and related companies ("Century") seek to compel respondent Viacom International ("Viacom") to arbitrate their insurance coverage dispute pursuant to the arbitration clause of a settlement agreement between the parties. Viacom moves to dismiss or stay the petition, arguing primarily that the matter is already being litigated in New Jersey state court, where Century has purportedly waived its right to arbitration. For the reasons that follow, Viacom's motion is denied and the petition to compel is granted.

BACKGROUND

The following facts, drawn from the petition and other documents annexed to the pleadings, are not in dispute, except as otherwise noted.

A. The Settlement Agreement

On April 22, 1996, Century and Viacom entered into an agreement (the "Agreement") settling insurance coverage disputes, including a lawsuit in New York Supreme Court, stemming from environmental contamination at several sites owned by Viacom and insured by Century. Under the Agreement, Century paid Viacom for certain "site" and "policy" releases. The former released Century from any obligation to Viacom for environmental claims at specific sites, under "any and all Century policies issued" to Viacom; the latter released Century from any obligation, "past, present and future," under specific policies, for claims at any site. (Pet. ¶ 6; Agreement ¶ 10). 1

The Agreement includes policy releases concerning Century policy numbers CIZ 42 61 97 and XCP 145057; the primary site releases concern Viacom's Eagle Mine and associated facilities in Colorado. (Pet. ¶¶ 8-10; Agreement ¶¶ 10-11). The Agreement provides that all coverage, "whether past or present, known or unknown, is completely and irrevocably rescinded" and payment under the Agreement constitutes "an exhaustion of all applicable limits of liability" under the policies. (Agreement ¶¶ 20, 29).

The Agreement contains a choice of law and arbitration clause that provides:

This Agreement shall be governed by the law of the State of New York.... The parties agree that any dispute or claim in any way arising out of this Agreement shall be settled by arbitration within the State of New York, and judgment upon the award rendered by the arbitrator(s) may be entered in either the Supreme Court of the State of New York for New York County or the United States District Court for the Southern District of New York.

The parties hereby consent to the jurisdiction of said courts for such purpose.

(Agreement ¶ 40). The Agreement also contains an integration clause (id. ¶ ¶ 23, 34), and a provision that "[a]ny delay or failure by the parties to exercise any of their respective rights or obligations hereunder shall not constitute a waiver of any such rights or obligations under the Agreement." (Id. ¶ 35).

B. The New Jersey Action

On November 24, 1999, Viacom filed a declaratory judgment and damages action in Superior Court in Somerset County, New Jersey. The action now involves claims related to environmental contamination at 46 sites in 17 states, and spans decades of coverage provided by approximately 84 primary and excess insurance carriers, including Century. The 77-page initial complaint referred to Century policy number CIZ 42 61 97 for the period January 1, 1983 to January 1, 1984, and separately listed the same policy number, CIZ 42 61 97, for the period January 1, 1984 to January 1, 1985. (N.J.Compl.Ex. J). The complaint included claims relating to the Eagle Mine site in Colorado (N.J.Compl.¶ 169), but at the same time referred to the New York litigation begun in 1993 and indicated that Viacom "makes no claim against any [insurer] with which it has settled for any costs or damages falling within the scope of the releases [Viacom] granted." (N.J.Compl.¶ 171). Hence, the complaint refers to dozens of primary and excess insurance policies, including other policies issued by Century.

*2 Century filed its answer to the complaint on January 26, 2000. The answer did not assert a right to arbitration as a defense to any claims, although Century raised "prior settlement and release" as an affirmative defense. (Century N.J. Answer at 51). The final page of the answer contained the required certification pursuant to New Jersey Court Rule 4:5-1, stating that "this action is not the subject of any presently pending action or arbitration and [counsel is] not aware that any such actions are contemplated." (Century N.J. Answer at 57).

1. The Settlement Process

In February 2000, Viacom asked the New Jersey court to stay "all aspects of the insurance litigation in favor of an informal discovery/settlement process" to be supervised by the court. (Napierkowski Aff. Ex. D). The court held a conference in July, and issued Case Management Order ("CMO") No. 1 on September 21, 2000, setting out the terms of the first informal document production by Viacom and the carriers. The parties agreed to maintain the confidentiality of the information exchanged; Viacom provided material to some carriers on the condition that the information would not be shared with other carriers. CMO No. 1 § IV(A) provided that "[a]ll discovery, motion practice and other matters of formal litigation between Viacom ... and the Carriers ... are stayed until further order of the Court." The court continued the stay of formal litigation as it supervised the progress of informal discovery through six additional CMO's, through May 2002. No substantive motions were filed during this period, and no depositions or formal discovery occurred. Century consented to the entry of the CMO's and never mentioned a right to arbitrate at any of the accompanying case management conferences. Viacom eventually produced some 400,000 pages of documents and placed them in a document repository.

Viacom filed an amended complaint on October 23, 2000; the amended complaint included policy number CIZ 42 61 97, listed at two exhibits. (Am.Compl.Exs.B, J). Viacom filed a second amended complaint on January 23, 2001. This pleading does not list CIZ 42 61 97. Viacom insists this omission was a clerical error. Century maintains that the second amended complaint "abandoned" the disputed claims following "the mutual exchange of the Settlement Agreement" and other confidential documents on October 31, 2000, noting that the policy was deleted from two separate exhibits. (See Century Br. at 6-7; Napierkowski Aff. ¶ 9-11). The second amended complaint also repeats the language of the original complaint acknowledging the litigation begun in 1993 against certain carriers and the resulting Agreement releasing them. (See Compl. ¶ 171; Second Am. Compl. ¶ 169).

Viacom contends it never intended to abandon its claims against the disputed policy. Viacom notes that on June 8, 2001, for example, Viacom provided Century with expert materials allocating damages under the disputed policy. (Arffa Aff. Exs. E-F (enclosing "[a]dditional cost backup packages relating to the ... Eagle Mine ... site[]")). Century does not dispute that Viacom made coverage demands for the Eagle Mine site and under policy CIZ 42 61 97, even after the second amended complaint. The

demand occurred during a phase of the settlement process following the May 4, 2001 case management conference, where the New Jersey court ordered Viacom to attempt "to provide each carrier with settlement material and a settlement demand by July 31, 2001." (CMO No. 3). Viacom forwarded the material on June 8, 2001; documents and expert material were exchanged in the ensuing months. Century made a counter-offer at a meeting on April 10, 2002. Century's response included the assertion that Viacom had released coverage for the Eagle Mine site and the CIZ 42 61 97 policy.

2. The Arbitration Demand

*3 That same day, April 10, 2002, Century sent Viacom a letter requesting Viacom to agree to arbitrate disputes relating to two of the claims in the New Jersey action. The letter indicated that, contrary to the releases provided under the Agreement, Viacom apparently sought to recover from Century for the Eagle Mine site, under policies dating from the 1950's, and for the Palmerton, Pennsylvania zinc site, under Century policy number CIZ 42 61 97. The letter also indicated that "Viacom should agree to a complete stay of all proceedings with respect to the Eagle Mine and Palmerton Zinc sites pending arbitration." (Arffa Aff. Ex. G). Century restated the demand by letter dated April 22, 2002, and threatened that it would "seek to stay all discovery by any party on the Eagle Mine Site and the Palmerton Site pending the outcome of the arbitration." (Arffa Aff. Ex. H).

Apparently, Viacom never responded, and on May 13, 2002, Century served and filed the instant petition to compel arbitration. On May 24, 2002, Viacom filed a motion asking the New Jersey court to declare that Century "by its conduct in this action, has waived any right to arbitrate Viacom's claims in this action or any portion of those claims." (Arffa Aff. Ex. I).

3. The New Jersey Court Denies Viacom's Motion In their papers filed in this Court, the parties spent a great deal of time discussing whether the Court should abstain from deciding the matter in light of the motion before the New Jersey court, and whether this Court or the state court had the power to compel arbitration in this district. These objections are now moot, as the New Jersey court has ruled. Viacom Int'l, Inc. v. Admiral Ins. Co., Docket No. SOM-L-1739-99, Order dated Aug. 23, 2002. In a 13-page decision, that court found the Southern

District of New York was the proper forum to decide the waiver issue due to the forum selection clause in the Agreement which "divests the New Jersey Superior Court of jurisdiction." *Id.* at 8. The court noted that 9 U.S.C. § 4 requires that arbitral proceedings take place "within the district in which the petition for an order directing such arbitration is filed." *Id.* Nonetheless, the court proceeded to analyze the waiver issue, noting it would conclude that "[i]t cannot be said that Century has abandoned [its] right arbitrate at this early stage of the litigation." *Id.* at 11. The court stayed discovery "only with regard to the Century policy involved in the New York litigation." *Id.* at 13.

DISCUSSION

I. Applicable Law

A. Enforcing an Agreement to Arbitrate

The Federal Arbitration Act ("FAA") reflects Congress's strong preference for arbitration. The FAA, codified at 9 U.S.C. §§ 1-14, provides that written provisions to arbitrate controversies in any contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id. § 2. "There is a strong federal policy favoring arbitration as an alternative means of dispute resolution." Hartford Accident & Indem. Co. v. Swiss Reinsurance Am. Corp., 246 F.3d 219, 226 (2d Cir.2001). Indeed, the Supreme Court has stated that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). This is especially so, where, as here, the existence of an arbitration agreement is undisputed. See ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co., 307 F.3d 24, 29 (2d Cir.2002).

*4 In light of this policy, "[t]he Second Circuit has established a two-part test for determining arbitrability of claims not involving federal statutes: (1) whether the parties agreed to arbitrate disputes at all; and (2) whether the dispute at issue comes within the scope of the arbitration agreement." ACE Capital Re Overseas Ltd., 307 F.3d at 28. As for the matter of who determines arbitrability, that issue "may only be referred

to the arbitrator if 'there is "clear and unmistakable" evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." 'Bell v. Cendant Corp., 293 F.3d 563, 566 (2d Cir.2002) (quoting Paine Webber Inc. v. Bybyk, 81 F.3d 1193, 1198 (2d Cir.1996)).

B. Waiver of the Arbitration Right

A party may expressly waive its right to arbitration, and if so, prejudice need not be shown. See Gilmore v. Shearson/American Express, 811 F.2d 108, 112-13 (2d Cir.1987). As for implied wavier, in light of the federal policy favoring arbitration, the Second Circuit has noted that "[w]e have often stated that waiver of arbitration is not to be lightly inferred." In re Crysen/ Montenay Energy Co., 226 F.3d 160, 162 (2d Cir.2000) (quoting PPG Indus., Inc. v. Webster Auto Parts Inc., 128 F.3d 103, 107-08 (2d Cir.1997)). Nonetheless, a party waives its right to arbitration "when it engages in protracted litigation that prejudices the opposing party." In re Crysen/Montenay Energy Co., 226 F.3d at 162. Prejudice "refers to the inherent unfairness-in terms of delay, expense, or damage to a party's legal position-that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." Id. at 162-63. The determination must consider "such factors as (1) the time elapsed from commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." Id. at 163. There is no bright-line rule, however, for determining when a party has waived its right to arbitration, and the determination depends on the particular facts of each case. Id.

As for who decides waiver, here, this Court may decide the issue. See Bell v. Cendant Corp., 293 F.3d 563, 569 (2d Cir.2002). This case is a FAA § 4 petition to compel, not a motion for stay under § 3; technically, waiver is not a ground for "revocation" of a contract within the meaning of § 2, and thus not a basis for invalidating an arbitration contract. See Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 454 (2d Cir.1995). Under § 4, a court is required to grant a petition to compel arbitration "except where a question of fact exists as to (1) the making of the arbitration agreement or (2) the failure, neglect, or refusal of another [i.e., the respondent to the § 4 petition] to arbitrate." Id. (citations and internal quotations omitted). Because waiver of the right to arbitrate does not fall within

either of these enumerated categories, a district court cannot ordinarily refuse to order arbitration under § 4 on a theory of waiver. *Id.* An exception exists, however, "where the party invoking arbitration ... was allegedly involved in prior litigation in state courts." *Id.* at 456; *see Bell,* 293 F.3d at 569 ("However, to prevent forum shopping the district court could properly decide the question when the party seeking arbitration had already participated in litigation *on the dispute.*") (internal quotation omitted).

II. Application

*5 Applying these principles to the facts of this case, I conclude first that the dispute between the parties is within the scope of the arbitration clause of the Agreement. Second, I conclude that Century has not waived its right to arbitrate. Thus, the motion to dismiss is denied, the petition is granted, and the parties must proceed to arbitration.

A. The Dispute is Within the Scope of the Arbitration Clause

[1] As a preliminary matter, I note that the issue of arbitrability is for this Court to decide. The arbitration clause, construed in accord with New York law, does not provide clear and unmistakable evidence referring the matter of arbitrability to the arbitrator.

[2] Viacom's argument regarding arbitrability is simple. Viacom does not contest the existence or validity of the arbitration clause contained in the settlement agreement. Instead, Viacom insists that there are actually two Century policies numbered CIZ 42 61 97: a 1983 policy and a 1984 renewal of the earlier policy. Viacom contends that the Agreement only applies to the 1983 policy, citing, among other things, the dispute underlying the Agreement, the general practice of renewal in the insurance industry, and the understanding of the parties.

The Court need not reach the merits of this argument, as it is misdirected. Viacom conflates the issue of the scope of the Agreement with the question of the scope of the arbitration clause. The scope of the clause is broad, representing a binding agreement "that any dispute or claim in any way arising out of this Agreement shall be settled by arbitration." See ACE Capital Re Overseas Ltd., 307 F.3d at 31-32 (discussing similar broad arbitration clauses). Whether the Agreement-which refers to a single policy number-covers only one policy numbered CIZ 42

61 97, or its identically numbered renewal, is a dispute squarely within that clause's broad scope, and thus a matter that the parties have agreed to settle by arbitration.

Even if I were to assume that Viacom is correct that the Agreement refers to a different Century policy numbered CIZ 42 61 97, this is not enough under the deferential standard that applies to arbitration agreements. It is well settled that "arbitration is indicated unless it can be said 'with positive assurance' that an arbitration clause is not susceptible to an interpretation that covers the asserted dispute." Specht v. Netscape Communications Corp., 306 F.3d 17, 35 (2d Cir.2002) (citations and internal quotations omitted). As the face of the Agreement refers to a single policy number CIZ 42 61 97, there can be no question that it is "susceptible" to an interpretation that it covers disputes related to other, theoretically distinct policies with the identical number. See Concourse Vill., Inc. v. Local 32E, SEIU, AFL-CIO, 822 F.2d 302, 305 (2d Cir.1987) (ordering arbitration despite dispute over whether "superintendents" were covered by underlying agreement, noting "[w]e will order arbitration if the arbitration clause is broad and if the party seeking arbitration has made a claim that on its face is governed by the contract") (quoting Associated Brick Mason Contractors of Greater New York v. Harrington, 820 F.2d 31, 35 (2d Cir.1987)).

B. Century Did Not Waive Its Right to Arbitrate

*6 [3] As discussed above, ordinarily, the defense of waiver brought in opposition to a motion to compel arbitration is a matter to be decided by the arbitrator. See Bell, 293 F.3d at 569. This case falls within a narrow exception that exists when the party seeking to compel arbitration has participated in litigation on the same dispute it now seeks to arbitrate. Id. Applying the applicable standards to the facts of this case, I conclude that Century did not waive its contractual right to arbitrate, either expressly or by its conduct.

1. Express Waiver

Viacom is correct that if Century expressly waived its right to arbitrate, prejudice need not be shown, and the petition should be dismissed. There is no such waiver here.

Viacom places great weight upon *Gilmore v. Shearsonl American Express*, 811 F.2d 108 (2d Cir.1987). This case is not on point. In *Gilmore*, the court found an explicit

waiver by the defendant's "express withdrawal of an earlier motion to compel arbitration [that] waived any contractual right it might have had to compel arbitration of those claims." 811 F.2d at 109. Not only did the defendant/petitioner in *Gilmore* withdraw its first petition, it actively litigated in the interim before its second. Nothing resembling that case is present here.

Viacom's argument here rests upon Century's failure to include the Agreement's arbitration provision as an affirmative defense, and its certification to the state court that no arbitration was contemplated. These acts do not amount to express waiver. First, Century included in each answer an affirmative defense of prior settlement and release. More importantly, each of Viacom's successive complaints referred to the 1993 litigation in New York and explicitly asserted no claims against the insurers released by that settlement. On the other hand, the complaint asserted claims under policies issued by Century that were *not* covered by the Agreement. Century thus had no clear need to assert its right to arbitration with respect to the policies covered by the Agreement.

Even accepting the notion that the second amended complaint mistakenly omitted reference to the disputed policy, it was not at all clear-until Viacom obtained leave to file a third amended complaint in late September 2002-that Viacom sought coverage despite its releases. The operative pleading in the case for nearly two years contained no reference to the disputed policy. In this context, no affirmative defense may have been necessary; at the very least, failure to assert the defense does not amount to an express waiver. The same holds true for Century's certification to the New Jersey court-no arbitration was contemplated because the complaints acknowledged the Agreement and asserted no coverage that would conflict with it.

In any event, the very complexity of the litigation in New Jersey weighs against a finding that Century expressly waived its right to arbitration. Unlike *Gilmore*, this litigation involves a number of insurers, and, even as to Century itself, a number of different policies are at issue, again, including policies *not* covered by the Agreement. It was not until June 2001 that Viacom forwarded the first of three settlement demands-in five notebooks, with numerous charts and tables-that set out specific coverage demands including the released site (Eagle Mine) and policy number CIZ 42 61 97. (*See* Napierkowski Aff. ¶ 14).

By its own account, Viacom itself has had some difficulty managing the information in this complex case, as it asserts it inadvertently omitted a reference to two separate policy numbers in the second amended complaint. In this context, it cannot be said that Century expressly waived its arbitration right.

2. Implied Waiver

*7 [4] In view of all the circumstances, it is likewise clear that Century did not constructively waive its right to arbitrate by "engag[ing] in protracted litigation that prejudice[d] the opposing party." *PPG Indus., Inc. v. Webster Auto Parts Inc.*, 128 F.3d at 107. This can be seen by considering the relevant factors, including "(1) the time elapsed from the commencement of litigation to the request for arbitration, (2) the amount of litigation (including any substantive motions and discovery), and (3) proof of prejudice." *Id.* at 107-08.

As the New Jersey court noted, notwithstanding that it was first filed in 1999, the extensive state court litigation is still in its early stages. This is because Viacom asked for a stay of formal proceedings to undertake settlement negotiations supervised by the court.

The delay here is not troubling. First, as a technical matter, since January 2001, the released policy was not at issue in state court as it was excluded from the second amended complaint. Second, no substantive motions have been noticed, let alone briefed or decided. Century is not seeking to invoke arbitration in the face of adverse rulings; there have been none. All that has occurred is voluntary, informal discovery.

Viacom's argument for prejudice rests entirely upon this informal exchange of documents, but it is not clear that Viacom produced any documents relevant to the arbitration issue. The voluntary exchange of documents alone does not constitute prejudice. Viacom's submissions on this point are overwrought, accusing Century of acting in bad faith. (See e.g., Viacom Reply Br. at 9 ("Century knew exactly what it was doing when it participated in the informal process without raising the arbitration issue."; Viacom Br. at 20 ("[W]e now believe Century's failure to mention any contemplated arbitration was intentional.")). These claims of injury are exaggerated, and in any event do not meet the applicable standard that resolves any doubt

as to waiver in favor of requiring arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

This is not a simple case where one party attempts to take advantage of court-supervised discovery that would be unavailable in a later arbitration. The New Jersey litigation involves claims against 83 carriers beside Century, and it was to all of these carriers that Viacom directed its document production. Viacom would have produced the documents regardless of Century's involvement, and because Century is implicated at other sites, it would have access to the same repository. Further, the dispute covered by the Agreement is a small fraction of the overall litigation; any additional expense Viacom incurred is marginal.

In addition, Viacom argues that Century will cause prejudice to Viacom by seeking a stay of all discovery in the New Jersey action, bringing the entire action to a halt. This argument is now moot, as the New Jersey court's ruling stayed only those claims related to the Agreement. Viacom has failed to show prejudice, and Century has not constructively waived its right to arbitration.

C. Appointment of an Arbitrator

*8 The agreement of the parties does not provide for the selection of an arbitrator. Thus, upon the petition of either party, this Court must do so. See 9 U.S.C. § 5. Here, Century has asked the Court to compel the parties to proceed to arbitration in New York pursuant to the rules of the American Arbitration Association, and to follow that organization's rules for the selection of an arbitrator. This application is granted.

CONCLUSION

The motion to dismiss or stay the petition to compel arbitration is denied, and the petition to compel arbitration is granted. The Clerk of the Court shall enter judgment accordingly, and this case shall be closed.

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 402792

Footnotes

1 References to "Pet." are to the Second Amended Petition, the operative pleading in this case. The Second Amended Petition was filed under seal; however, save for incorporating portions of the Agreement, it is nearly identical to the first, publicly filed Petition. As the parties have endeavored to keep the terms of the Agreement confidential and have filed their papers under seal, I have omitted details of the Agreement that are not necessary to decide this motion.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit T

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Growtech Partners v. Accenture LLP, S.D.Tex.,
July 13, 2015

1995 WL 729329

Only the Westlaw citation is currently available. United States District Court, E.D. Louisiana.

TRITON CONTAINER INTERNATIONAL, LTD.

V.

BALTIC SHIPPING CO., et al.

Civ. A. Nos. 95–0427, 95–2229.

Dec. 8, 1995.

MEMORANDUM AND ORDER

SEAR, Chief Judge.

Background

*1 Baltic Shipping Company ("Baltic"), a Russian merchant line, has filed a Motion to Stay Pending Arbitration in this suit brought by Naviomar, S.A. de C.V. ("Naviomar"), a Mexican company which served as Baltic's agent for vessels trading in Mexican ports. The parties' relationship began in March 1992, when Naviomar agreed to pay Baltic's \$700,000 debt to a Mexican stevedoring company so that a Baltic vessel detained in Veracruz, Mexico could be released. In a letter dated March 17, 1992, Baltic assured Naviomar that it would be reimbursed through freight collected by its former Mexican agent and the freight which Naviomar would collect as the new agent of Baltic. On March 30, 1992, Baltic and Naviomar signed a onepage agreement evidencing their agency relationship. This agreement established procedures for settling monthly balances of freights collected and disbursements made by Naviomar as agent for Baltic. No mention of arbitration or other dispute resolution mechanism appears in this initial agreement.

On July 13, 1992, Baltic and Naviomar entered a second written agency agreement. This agreement, unlike the first one, describes in detail the parties' responsibilities and relationship. Two clauses of this second agreement bear particular mention. First, there is an arbitration provision in Clause 7.1 providing that:

All disputes between Owner and Agent which may arise in connection with the fulfilment [sic] of this Agreement are to be settled amicably, but if impossible then to be reffered [sic] to the Maritime Arbitration Commission in Moscow for arbitration under the rules of this Commission.

Second, Clause 12.2 declares that on signing of the new agreement, "all previous [Agency] Agreements between Owner and Agent ... become null and void."

As the agency relationship continued, the amount owed by Baltic to Naviomar fluctuated monthly depending on freights collected and disbursements made. Baltic's financial situation appears not to have improved, and in an April 1993 facsimile Baltic urgently requested \$1,000,000 which Naviomar supplied in the form of two \$500,000 transfers. In return for this further assistance, Baltic gave up its right to have other agents in Mexico and increased the agency commission payable to Naviomar.

Naviomar contends that over the ensuing two years Baltic's debt to Naviomar continued to grow as disbursements made outpaced freights collected. Finally, on July 10, 1995, Naviomar filed suit in this district against Baltic, *in personam*, and one of its vessels, the M/V BUDAPESHT, *in rem*. On August 21, 1995, Naviomar's case was consolidated with other suits in this district brought by creditors of Baltic.

Baltic's Motion to Stay Pending Arbitration

Baltic's original answer did not raise the issue of arbitration, but its amended answer filed on September 1, 1995, specifically reserved the right to arbitrate. On October 31, 1995, Baltic filed this Motion to Stay Pending Arbitration arguing that efforts to resolve this dispute amicably have failed and that there was no choice but to proceed to binding arbitration. In particular, Baltic argues that Naviomar has forced this motion to stay by repeatedly pressing for acknowledgement of a greater debt than Baltic owes and by arresting another Baltic vessel in the Middle District of Louisiana. Naviomar opposes the motion to stay arguing: (1) that the arbitration clause does not apply to a large portion of Naviomar's claim; (2) that enforcement of the arbitration clause in this case would

be inequitable; and (3) that Baltic has waived its right to arbitration.

Analysis

*2 The Federal Arbitration Act provides that a court, upon being satisfied that a matter is covered by a written agreement to arbitrate, "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. In addition, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the United States, Russia and Mexico are signatories, requires each Contracting State to recognize written arbitration agreements and further requires courts, upon request, to "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article II(1-3); 9 U.S.C. § 201 et seq. Taken together, the Federal Arbitration Act and the Convention indicate a strong federal policy favoring agreements to arbitrate, especially in the context of international commerce. With this policy in mind, I now address the arguments advanced by Naviomar in opposition to Baltic's Motion to Stay Pending Arbitration.

I. Applicability of the arbitration clause When the scope of an arbitration clause is debatable or reasonably in doubt, a court should construe the contractual provision in favor of arbitration. Mar-Len of Louisiana, Inc. v. Parsons-Gilbane, 773 F.2d 633, 635 (5th

Cir. 1985). As the Fifth Circuit has repeatedly stated,

arbitration should not be denied unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that would cover the dispute at issue.

Id. (internal quotations and citations omitted).

Naviomar contends that the arbitration clause does not cover the two \$500,000 transfers that occurred in April 1993, because the \$1,000,000 constituted a loan and was not related to the fulfillment of the agency agreement.

I disagree. The second agency agreement specifically provided in Addendum No. 3(5) that any balance due to Naviomar "will be settled by [Baltic] in good time in a manner to be agreed upon." It is the parties' failure to agree in this respect that has left Naviomar in its present predicament.

Naviomar also argues that the arbitration clause does not cover the initial \$700,00 transfer, since this transfer predated the signing of the second agency agreement. However, it does not appear that a separate account of that portion of Baltic's balance with Naviomar was maintained. All moneys owed by Baltic were treated in a similar manner (except that the interest rate on the \$1,000,000 was somewhat higher). Thus, I find that Naviomar acquiesced to having the prior balance fall within the ambit of the second agreement, especially in light of Clause 12.2 of the second agreement which provided that all prior agreements between the parties were null and void. In sum, the entire dispute between these parties falls within the scope of the arbitration clause and, absent some legally cognizable reason, must be referred to arbitration in Moscow.

II. Inequity

*3 Relying on Mitsubishi Motors Corp. v. Soler Chrysler— Plymouth, Inc., 473 U.S. 614 (1985), Naviomar argues that enforcing the arbitration clause would essentially deny it justice, as fair arbitration cannot be had in Moscow. However, the Fifth Circuit has held that the equitable considerations involved in decisions to enforce forum selection clauses, as discussed in The Bremen, 407 U.S. 1 (1972), and upon which *Mitsubishi* relies, do not apply in the arbitration context. Reisfeld & Son Import Co. v. S.A. Eteco, 530 F.2d 679 (5th Cir.1976). While Mitsubishi may have cast doubt, the Fifth Circuit has since repeated with favor its holding in *Reisfeld* that equitable concerns are not to play a role in the arbitration context. See National Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 332 (5th Cir.), cert. denied, 484 U.S. 943 (1987). Therefore, even if Naviomar's allegations are true, I cannot take them into account.

Along the same line, Naviomar contends that it did not bargain for the arbitration clause in the second agency agreement, but rather was forced to accept it because Baltic exerted its financial leverage against Naviomar. While undue influence and duress do have a place in analyzing contractual provisions, I do not think this

is the appropriate case. Both Naviomar and Baltic are sophisticated enterprises engaged in international commerce. It would strain logic to find that Naviomar, the party with greater financial resources, somehow suffered economic coercion at the hands of Baltic.

III. Waiver

The right to arbitrate, like other contractual rights, may be waived. Price v. Drexel Burnham Lambert, Inc., 791 F.2d 1156, 1158 (5th Cir.1986). In the context of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, courts have recognized that Article II(3) "contemplates the possibility of waiver of the arbitration agreement" by one or both of the parties. I.T.A.D. Associates, Inc. v. Podar Bros., 636 F.2d 75, 77 (4th Cir.1981). See also Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50, 53 (3d Cir.1983). Waiver will be implied only where the party seeking arbitration has substantially invoked the judicial process to the prejudice of the other party. Walker v. J.C. Bradford & Co., 938 F.2d 575, 577 (5th Cir.1991); Frye v. Paine, Webber, Jackson & Curtis, Inc., 877 F.2d 396, 398 (5th Cir.1989), cert. denied, 494 U.S. 1016 (1990). However, waiver may also be express. In such a case, the party opposing arbitration should not have to show prejudice because the moving party has knowingly relinquished a contractual right.

To support its contention of express waiver Naviomar points to a September 8, 1995, facsimile message from Baltic's President, G. Filimonov, to the President of Naviomar. Naviomar's Memorandum in Opposition, Exhibit G. In this message, Mr. Filimonov initially referred to a communication he sent the same day to Baltic's local counsel in which he instructed counsel to inform the court in New Orleans that Baltic

considers Naviomar to be a lawful creditor. Naviomar's Memorandum in Opposition, Exhibit M. Then after confirming Baltic's debt to Naviomar, Mr. Filimonov stated that "We will settle the debt for the mutual satisfaction and we are not going to go to Moscow arbitration for this matter." Naviomar's Memorandum in Opposition, Exhibit G (emphasis added).

*4 Mr. Filimonov made this statement on September 8, 1995, with full awareness that issue had been joined in this forum. Indeed, Mr. Filimonov instructed local counsel to relay certain information to the court. *See* Naviomar's Memorandum in Opposition, Exhibit M. This knowledge coupled with the unambiguous statement that Baltic was not going to go to Moscow for arbitration in this matter indicates that Baltic made a deliberate choice to resolve the dispute in this forum rather than in Moscow. Under these circumstances, I find that Baltic has expressly waived its rights under the arbitration clause. ¹

Conclusion

While appreciating the strong federal policy in favor of upholding agreements to arbitrate, I find that Baltic expressly waived its contractual right to arbitration in this case.

Accordingly,

IT IS ORDERED that Baltic Shipping Company's Motion to Stay Pending Arbitration be and is hereby DENIED.

All Citations

Not Reported in F.Supp., 1995 WL 729329

Footnotes

Because I have found express waiver, it is unnecessary to reach the issue of whether Baltic's conduct thus far has prejudiced Naviomar so as to justify a finding of implied waiver.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit U

2016 WL 2594186

Only the Westlaw citation is currently available.

United States District Court,

M.D. Pennsylvania.

Camp Ne'er Too Late, LP, Plaintiff, v.

Swepi, LP, Defendant.

No. 4:14-cv-01715 | Signed May 5, 2016

Synopsis

Background: Natural gas lessor brought breach of contract action in state court against lessee, which was natural gas drilling company, regarding obligations under natural gas lease and subsequent right-of-way agreements to construct pipelines, and seeking injunctive and monetary relief. Lessee removed to federal court. Lessor and lessee both moved for summary judgment.

Holdings: The District Court, Matthew W. Brann, J., held that:

- [1] under Pennsylvania contract law, lessor had standing to sue for breach of lease, although lessor was not signatory to lease;
- [2] under Pennsylvania contract law, lease with addendum and subsequent pipeline right-of-way agreements were separate legal documents that constituted distinct agreements;
- [3] lessee did not breach lease; and
- [4] equitable estoppel precluded lessor from asserting claim against lessee.

Lessee's motion granted, and lessor's motion denied.

West Headnotes (36)

[1] Partnership

Persons entitled to sue; standing

289 Partnership

289IX Limited Partnerships

289IX(D) Relation of Partners to Third Parties

289k1176 Actions by or Against Partnership or

Partners

289k1181 Persons entitled to sue; standing

Under Pennsylvania contract law, limited partnership (LP), which had been assigned rights to natural gas lease from original nonprofit corporation lessor, which assignment had been recorded, had standing to sue lessee, which was natural gas drilling company, for breach of right-of-way agreement by alleging derivative breach of natural gas lease and lease addendum to which LP was not contracting party, although prior to assignment to LP, lessor had assigned, though not recorded, rights to lease to lessor's individual shareholders, and although LP had never received assignment of lease rights in full, since LP was party to right-ofway agreements that referenced and allegedly incorporated contested provisions of lease and lease addendum. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[2] Federal Courts

Substance or procedure; determinativeness

170B Federal Courts

170BXV State or Federal Laws as Rules of

Decision; Erie Doctrine

170BXV(A) In General

170Bk3005 Substance or procedure;

determinativeness

A federal court sitting in diversity must apply state substantive law and federal procedural law.

Cases that cite this headnote

[3] Federal Civil Procedure

← In general;injury or interest

Federal Courts

• Injury, harm, causation, and redress

170A Federal Civil Procedure

170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170B Federal Courts

170BIII Case or Controversy Requirement

170BIII(A) In General

170Bk2105 Injury, harm, causation, and

redress

Court's determination of the likelihood of success on the merits of the case is a separate inquiry from the threshold issue of Article III standing; to demonstrate its standing to sue, a plaintiff must only allege that they have suffered sufficient injury to comply with Article III's case or controversy requirement. U.S.C.A. Const. Art. 3, § 2, cl. 1.

Cases that cite this headnote

[4] Action

Persons entitled to sue

13 Action

13I Grounds and Conditions Precedent

13k13 Persons entitled to sue

The requirement of standing under Pennsylvania law is prudential in nature, and stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete, rather than abstract.

Cases that cite this headnote

[5] Action

Persons entitled to sue

13 Action

13I Grounds and Conditions Precedent

13k13 Persons entitled to sue

Under Pennsylvania law, a party has standing to bring a cause of action if it is aggrieved by the actions complained of, that is, if its interest in the outcome of the litigation is substantial, direct, and immediate; for this purpose, a "substantial interest" is one that surpasses the common interest of all citizens in procuring obedience to the law, a "direct interest" requires a showing that the matter complained of caused harm to the party, and an "immediate interest" involves

the nature of the causal connection and signifies that judicial intervention is ordinarily inappropriate when the harm alleged is remote and speculative.

Cases that cite this headnote

[6] Contracts

Duties and liabilities of third persons

95 Contracts

95II Construction and Operation

95II(B) Parties

95k188 Duties and liabilities of third persons

Under common law contract principles, a party may adopt and be bound to a contract to which it was not originally a signatory; such construction is particularly apt where the plaintiff had not been created at the time the agreement was drafted and signed but had an explicit relationship to the agreement.

Cases that cite this headnote

[7] Contracts

Duties and liabilities of third persons

95 Contracts

95II Construction and Operation

95II(B) Parties

95k188 Duties and liabilities of third persons

There are no magic words for a non-signatory to explicitly adopt a contract; third parties to a contract become parties who are bound by the contract's terms by either explicitly or implicitly adopting the agreement.

Cases that cite this headnote

[8] Contracts

Successors in interest

95 Contracts

95II Construction and Operation

95II(B) Parties

95k185 Rights Acquired by Third Persons

95k186 Privity of Contract in General

95k186(3) Successors in interest

Express adoption of a contract occurs when a successor adopts a contract of a predecessor as its own.

Cases that cite this headnote

[9] Contracts

Duties and liabilities of third persons

95 Contracts

95II Construction and Operation

95II(B) Parties

95k188 Duties and liabilities of third persons

Implicit adoption of a contract occurs when a party accepts benefits intended for a third party beneficiary.

Cases that cite this headnote

[10] Contracts

Implied agreements

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k27 Implied agreements

As a result of plaintiff's actions, statements, and the benefits it received as a direct result of an agreement, the agreement can be held to be an implied in fact contract as it relates to plaintiff.

Cases that cite this headnote

[11] Contracts

Implied agreements

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k27 Implied agreements

An implied in fact contract has the legal equivalency of an express contract.

Cases that cite this headnote

[12] Contracts

Implied agreements

95 Contracts

95I Requisites and Validity

95I(B) Parties, Proposals, and Acceptance

95k27 Implied agreements

A contract implied in fact can be found by looking to the surrounding facts of the parties' dealings; implied contracts arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

Cases that cite this headnote

[13] Federal Civil Procedure

← Contract cases in general

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2492 Contract cases in general

The court can grant summary judgment on an issue of contract interpretation if the contractual language being interpreted is subject to only one reasonable interpretation. Fed. R. Civ. P. 56(a).

Cases that cite this headnote

[14] Contracts

Ambiguity in general

Contracts

Questions for Jury

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(2) Ambiguity in general

95 Contracts

95V Performance or Breach

95k323 Questions for Jury

95k323(1) In general

Under Pennsylvania law, in a breach of contract action, the court must determine, as a matter of law, whether the relevant contract terms are ambiguous; if the contract is unambiguous, then it is for the court to decide whether the contract was breached.

Cases that cite this headnote

[15] Contracts

Language of contract

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties 95k147(2) Language of contract

Under Pennsylvania law, contract interpretation is an attempt to ascertain the intent of the parties and give it effect, and when the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement.

Cases that cite this headnote

[16] Evidence

Grounds for admission of extrinsic evidence

157 Evidence

157XI Parol or Extrinsic Evidence Affecting Writings

157XI(D) Construction or Application of Language of Written Instrument

157k448 Grounds for admission of extrinsic evidence

In Pennsylvania, where the words of a contract are ambiguous, parol evidence is admissible to explain or clarify or resolve the ambiguity.

Cases that cite this headnote

[17] Contracts

Existence of ambiguity

Contracts

Construction as a whole

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in General

95k143(2) Existence of ambiguity

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143.5 Construction as a whole

When determining whether the language of an agreement is clear or ambiguous under Pennsylvania law, the court assumes that the parties intend all provisions in the agreement to be construed together and given effect; the focus is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended.

Cases that cite this headnote

[18] Contracts

Subject, object, or purpose as affecting construction

Contracts

← Language of Instrument

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in General

95k143(4) Subject, object, or purpose as

affecting construction

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k152 In general

Under Pennsylvania contract law, the court assumes generally that the parties have given words their commonly accepted and plain meaning, but also recognizes that every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different conclusion from what would have been reached had the usual meaning been ascribed to those words.

1 Cases that cite this headnote

[19] Contracts

Existence of ambiguity

Contracts

← Language of Instrument

Contracts

Construction by Parties

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k143 Application to Contracts in General

95k143(2) Existence of ambiguity

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k152 In general

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k170 Construction by Parties

95k170(1) In general

Interpretation of a contract under Pennsylvania law is not concerned with the parties' post hoc judgments as to what should have been, and the court will not rely upon a strained contrivancy to establish ambiguity; the court, rather, seeks to be faithful to the meaning that the parties, given their positions at the time of contracting, would have given their words ex ante.

1 Cases that cite this headnote

[20] Contracts

Questions for jury

95 Contracts

95III Modification and Merger

95k248 Questions for jury

The issue of whether a writing constitutes an integrated contract is a question of law.

Cases that cite this headnote

[21] Contracts

Merger in Subsequent Contract

95 Contracts

95III Modification and Merger

95k245 Merger in Subsequent Contract

95k245(1) In general

A contract is "integrated" under Pennsylvania law if it represents a final and complete expression of the parties' agreement; where a contract purports to be a complete legal obligation without any doubt as to its object or extent, it is presumed to reflect the whole legal right of the parties.

Cases that cite this headnote

[22] Landlord and Tenant

Construction and Operation

Landlord and Tenant

Intention of parties

Landlord and Tenant

Written terms as controlling

233 Landlord and Tenant

233II Leases and Agreements in General

233II(B) Construction and Operation

233k590 In general

233 Landlord and Tenant

233II Leases and Agreements in General

233II(B) Construction and Operation

233k593 Intention of parties

233 Landlord and Tenant

233II Leases and Agreements in General

233II(B) Construction and Operation

233k597 Written terms as controlling

Under Pennsylvania law, a lease is in the nature of a contract and is controlled by principles of contract law; it must be construed in accordance with the terms of the agreement as manifestly expressed, and the accepted and plain meaning of the language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement.

Cases that cite this headnote

[23] Contracts

Language of contract

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) Language of contract

The best evidence of what parties to a written agreement intend is what they say in their writing.

Cases that cite this headnote

[24] Gas

Mains, pipes, and appliances

Mines and Minerals

← In general; general rules of construction

190 Gas

190k9 Mains, pipes, and appliances

260 Mines and Minerals

260II Title, Conveyances, and Contracts

260II(C) Leases, Licenses, and Contracts

260II(C)3 Construction and Operation of Oil

and Gas Leases

260k73 In general; general rules of construction

Under Pennsylvania contract law, oil and gas lease with addendum and subsequent pipeline right-of-way agreements were separate legal documents that constituted distinct agreements, although agreements were executed between same parties or their predecessors-in-interest and concerned same general economic activity of natural gas drillings, where agreements were result of several temporally distinct sets of negotiations, regarded several separate contractual rights, involved several forms of consideration paid, and ultimately resulted in several separate agreements, each with its own integration clause.

Cases that cite this headnote

[25] Contracts

Construing instruments together

Contracts

- Presumptions and burden of proof

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k164 Construing instruments together

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k175 Evidence to Aid Construction

95k175(1) Presumptions and burden of proof

Even if there exists a relationship between the work performed under one agreement and that contemplated by another, the presumption, absent indication otherwise, is that they constitute two separate contracts, not two separate writings that were to be construed as two parts of one contract; this is true even if the two agreements concern the same subject matter or are part of the same bargain, and a key consideration is whether, upon execution of one agreement, the parties have established rights as between themselves.

Cases that cite this headnote

[26] Contracts

Matters annexed or referred to as part of contract

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k166 Matters annexed or referred to as part of contract

Under Pennsylvania law, incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship.

1 Cases that cite this headnote

[27] Contracts

Matters annexed or referred to as part of contract

Contracts

Questions for Jury

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k166 Matters annexed or referred to as part of contract

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k176 Questions for Jury

95k176(1) In general

Incorporation of a contract by reference is a question of law, and requires a reference in one document to the terms of another; moreover, the incorporating document must not only refer to the incorporated document, it must bring the terms of the incorporated document into itself as if fully set out.

1 Cases that cite this headnote

[28] Gas

← Mains, pipes, and appliances

190 Gas

190k9 Mains, pipes, and appliances

Under Pennsylvania law, oil and gas lease with addendum, and its native gas restriction, was not incorporated by reference into subsequent pipeline right-of-way agreement by introductory paragraph of addendum to right-of-way agreement, and thus lessee, which was natural gas drilling company, did not breach lease when it used pipeline to transport non-native gas or by failing to develop wells on leased premises, where rightof-way addendum was unambiguous as to conditional nature of incorporation, neither right-of-way agreement nor addendum included provision referencing preservation and incorporation of native gas restriction, there were no conflicting terms in right-ofway agreement and addendum, and lessor's representative played significant role in drafting contested language.

Cases that cite this headnote

[29] Contracts

Construction against party using words

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k151 Language of Instrument

95k155 Construction against party using words

Under the rule of contra proferentem, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable.

Cases that cite this headnote

[30] Estoppel

Nature and elements of waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(2) Nature and elements of waiver

A waiver in law is the act of intentionally relinquishing or abandoning some known right, claim or privilege; waiver is essentially a matter of intention.

Cases that cite this headnote

[31] Estoppel

← Nature and elements of waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(2) Nature and elements of waiver

To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it.

Cases that cite this headnote

[32] Estoppel

Nature and elements of waiver

Estoppel

Implied waiver and conduct constituting waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(2) Nature and elements of waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(3) Implied waiver and conduct

constituting waiver

A waiver may be express or implied, but in the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to.

Cases that cite this headnote

[33] Estoppel

Nature and elements of waiver

Estoppel

Implied waiver and conduct constituting waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(2) Nature and elements of waiver

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52.10 Waiver Distinguished

156k52.10(3) Implied waiver and conduct

constituting waiver

Waiver can be express or implied from conduct in situations that would support equitable estoppel.

Cases that cite this headnote

[34] Estoppel

When estoppel arises

156 Estoppel

156III Equitable Estoppel

156III(A) Nature and Essentials in General

156k52 Nature and Application of Estoppel in

Pais

156k52(4) When estoppel arises

Equitable estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts.

Cases that cite this headnote

[35] Estoppel

Ownership of property

Licenses

Right to revoke

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k82 Representations

156k83 In General

156k83(2) Ownership of property

238 Licenses

238II In Respect of Real Property

238k57 Revocation

238k59 Right to revoke

Under the doctrines of waiver and equitable estoppel, an implied license upon real property may become irrevocable when the

person granted the license has expended money and treated the property in a manner that they would not have treated it, but for the license.

Cases that cite this headnote

[36] Estoppel

Ownership of property

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k82 Representations

156k83 In General

156k83(2) Ownership of property

Course of conduct of natural gas lessor, which was limited partnership, after signing initial oil and gas lease was sufficient to conclude that lessor waived any expectation or right to preserve domestic gas limitation in lease addendum as it pertained to subsequent right-of-way agreements, and thus equitable estoppel precluded lessor from asserting claim regarding pipeline construction, where lessor accepted significant consideration above and beyond what lease and lease addendum required when it entered into subsequent right-of-way agreements showing that lessee paid lessor extra consideration to surrender additional contractual rights that lessee did not already possess, lessor's members were willing to work with lessee on extended basis, and right-of-way contest was instituted six years from onset of initial lease.

Cases that cite this headnote

Attorneys and Law Firms

Carl J. Engleman, Jr., Law Offices of Carl Engleman, Jr., LLC, Reading, PA, for Plaintiff.

Jeremy A. Mercer, Norton Rose Fulbright US LLP, Canonsburg, PA, for Defendant.

MEMORANDUM

Matthew W. Brann, United States District Judge

*1 The renowned eighteenth-century English poet Alexander Pope once wrote, "Blessed is the man who expects nothing, for he shall never be disappointed." ¹ The dispute presently before the Court was fueled by the outsized and unsupported expectations of landowners who entered into a natural gas lease and subsequent agreements during a time when such exploration was steadily reaching its zenith in Pennsylvania's northern tier counties. As the natural gas boom gradually winnowed, drilling companies, like the one hauled into court here, reacted with contractionary business decisions that included, among other defensive strategies, halting plans for the development of future wells.

The unfolding of this dispute has confirmed the well-established principle that the disappointment and dissatisfaction felt by a natural gas lessor as a result of the lessee's failure to develop its property—what plaintiff's representatives in this case have called their "shattered dreams"—do not afford the lessor a remedy at law if such development is not mandated by the clear text of an agreement between the parties.

Plaintiff, Camp Ne'er Too Late, LP, petitions this Court to extrapolate a set of contractual obligations on the part of Defendant, SWEPI, LP, from a single introductory paragraph of a right-of-way addendum, which Plaintiff's representatives drafted. This Court considers it highly unbefitting for federal judges to substitute their own predilections for those of the litigants who appear before them, particularly when those litigants have already expressed their intentions in the clear text of a bargained-for agreement.

Consequently, because Plaintiff's case theory simply is not borne out either by the text of the parties' agreements or the plain reality of the parties' course of dealings, its request that the Court engage in judicial revisionism of the instant natural gas lease and intervene on its behalf, now having the benefit of hindsight, must be rejected. Instead, this Court will honor the written agreement for which the parties bargained. As such and in accordance with the following reasoning, Defendant's Motion for Summary Judgment is granted and Plaintiff's corresponding Motion for Summary Judgment is denied. ²

I. BACKGROUND³

A. Ne'er Too Late Lodge and East Resources, Inc., negotiate and execute the 2008 lease and addendum.

*2 The instant dispute springs from the terms of natural gas lease governing a wooded 230-acre plot of land in Rutland Township, Tioga County, Pennsylvania. ⁴ That property, to which the subject lease applies, was acquired by Ne'er Too Late Lodge, a Pennsylvania nonprofit corporation, in 1966. ⁵ The nonprofit entity Ne'er Too Late Lodge shares its name with a small cabin that sits on the land in question, land which according to one of Plaintiff's partners, has been used throughout the years for private brook trout fishing, hunting, and similar outdoor activities. ⁶

On June 17, 2008, Ne'er Too Late Lodge and SWEPI, LP's predecessor-in-interest, East Resources, Inc., executed the oil and gas lease that ultimately gave rise to the present litigation. ⁷ The lease was negotiated on behalf of Ne'er Too Late Lodge by shareholder-brothers Robert A. Schwoyer and David Schwoyer, Sr., both of whom would later become general partners in Camp Ne'er Too Late, LP, the organization formed by Ne'er Too Late Lodge's shareholders to manage the business affairs associated with the lease. ⁸ David Schwoyer would also go on to testify in this matter as Plaintiff's Federal Rule of Civil Procedure 30(b)(6) designee.

In 2008, the parties agreed to a "paid-up" lease, meaning that Ne'er Too Late Lodge, solely for entering into the lease, received an up-front payment of \$287,500, which compensation was comprised of a bonus and accelerated delay rental fees. ⁹ The lease also provided that Ne'er Too Late Lodge would receive as a royalty payment one-eighth of the proceeds realized by East Resources through its sales of natural gas extracted from the property. ¹⁰

According to the text of the agreement, Ne'er Too Late Lodge leased the subject land to East Resources "for the purpose of exploring for, developing, producing and marketing oil and gas." ¹¹ The parties do not dispute that the lease gave East Resources the authority to place well pads on the leased premises and that nothing in the lease required the drilling of any number of wells. ¹² In fact,

prior to the expiration of the primary term of the lease, only one well had actually been drilled on the land. ¹³

Importantly, the Lease also granted East Resources the right to construct pipelines throughout the leased premises. ¹⁴ Specifically, Paragraph 11 of the lease ("Ancillary Rights"), provides that Ne'er Too Late Lodge granted to East Resources "the right of ingress and egress over, under and through said leased premises with the right to conduct such exclusive operations on the leased premises as may be necessary for such purposes, including but not limited to...the constructions and use of roads, pipelines, tanks, water wells, disposal wells injection wills, pits electric and telephone lines, and other facilities." ¹⁵

Although the lease provided that such constructions could be made "regardless of the source of such substances," during the course of the negotiations, the parties composed a lease addendum containing twenty additional paragraphs, one of which—Paragraph 12 restricted East Resources from constructing a pipeline on the leased premises unless that pipeline was used to transfer oil and/or gas from one or more wells drilled on the leased premises. ¹⁶ In the context of natural gas leases, gas transported across leased premises that is drilled from those same premises is known as "domestic" or "native" gas. ¹⁷ The parties attached the addendum to the lease and explicitly incorporated it. 18 The addendum provisions were therefore made effective upon execution of the lease itself. For the record, I will also note that the parties do not dispute either that the lease was a completely integrated document with a standard integration clause or that the lease disclaimed any and all implied obligations. ¹⁹

*3 At this juncture, it is also important to note that because Defendant ultimately did construct a pipeline that transported non-native gas over the subject land, the elemental issue in this litigation is whether the text of certain subsequent agreements between the parties incorporated Paragraph 12 of the lease addendum in any manner. Because the text of those agreements indicates otherwise, I conclude in my analysis below that Paragraph 12 of the lease addendum was not so incorporated.

Shortly thereafter, the shareholders of Ne'er Too Late Lodge engaged in the first of two inconsistent transactions. On November 14, 2008, five months after the

lease was executed, Ne'er Too Late Lodge assigned all of its rights under the lease to its individual shareholders. ²⁰ As part of the assignment, each of Ne'er Too Late Lodge's nine shareholders accepted an interest in the rights under lease in proportion to their ownership share in Ne'er Too Late Lodge. ²¹ That assignment was never recorded. ²² The second inconsistent transaction would occur in April 2010 and is detailed below in Part I.C.

B. Ne'er Too Late Lodge and East Resources negotiate and execute the 2009 right-of-way agreement. ²³

Despite the lease and its addendum having already given East Resources the right to construct a pipeline on the leased premises that carried only domestic gas, the parties nevertheless found it necessary to negotiate two right-ofway agreements that granted East Resources the ability to construct such a pipeline. These two subsequent rightof-way agreements did not include any limitations as to domestic gas or explicit references to Paragraph 12 of the lease addendum. Each of the subsequent rightof-way agreements also entailed additional consideration paid to Plaintiff or its predecessor-in-interest beyond what the lease required. These characteristics of the right-of-way agreements have now led Defendant, quite rightly in this Court's view, to argue that these peripheral agreements effectively granted it greater rights than what its predecessor-in-interest initially enjoyed under the lease, namely, the right to construct a pipeline capable of transporting non-native gas.

Accordingly, in 2009, Ne'er Too Late Lodge and East Resources began negotiating over what would be the first of two pipeline right-of-way agreements that were eventually executed as to the subject land. Though the 2010 right-of-way agreement, due to certain of its unique terms, is the document that largely gave rise to the present dispute, the Court will also briefly review the facts surrounding the execution of the 2009 agreement and 2011 amendment for the sake of completeness.

The 2009 right-of-way agreement was executed on November 28, 2009 and gave East Resources "the right to lay, maintain and remove a pipeline(s) over and through" the leased premises. ²⁴ Terry Bryant was the landman, the agent of East Resources with whom Robert A. Schwoyer negotiated. ²⁵ During his Rule 30(b)(6) deposition, David Schwoyer, Sr., could not recall any discussions with Mr.

Bryant related to how the 2009 right-of-way agreement interacted with the Lease. ²⁶

*4 Though nothing in the agreement references the lease or limits the location of the pipeline, a proposed pipeline map was attached to the agreement. ²⁷ Nevertheless, during his Rule 30(b)(6) deposition, Mr. Schwoyer admitted that a pipeline was never constructed in the particular way that the map depicted. ²⁸

The parties do not dispute that 2009 right-of-way agreement provided for compensation of five dollars per linear foot of the actual footage that East Resource's eventual right-of-way would utilize. ²⁹ The 2009 agreement was a fully integrated document, and as far as both parties are concerned, although an additional right-of-way agreement was negotiated, Plaintiff was never told that the 2009 agreement was invalid or no longer in force. ³⁰

C. The shareholders of Ne'er Too Late Lodge form Camp Ne'er Too Late, LP, in April 2010. Ne'er Too Late Lodge thereafter transfers its rights under the lease to Camp Ne'er Too Late in August 2010, despite having already transferred those rights to its individual shareholders in November 2008.

In April of 2010, the second of two conflicting transactions was effected by Ne'er Too Late Lodge. As discussed above in Part I.A, in November 2008, Ne'er Too Late Lodge assigned its rights under the lease to its individual shareholders in proportion to their ownership interest in the Ne'er Too Late Lodge. However, on August 2, 2010, Ne'er Too Late Lodge once again assigned its rights under the lease, this time to Camp Ne'er Too Late, LP, a limited partnership created in April 2010 by the nine individual shareholders of Ne'er Too Late Lodge to manage the business affairs associated with the lease. ³¹ Unlike the first assignment of the lease rights to Ne'er Too Late Lodge's shareholders, this subsequent assignment was recorded in the Office of the Recorder of Deeds of Tioga County, Pennsylvania. ³²

To ascertain the purpose behind these two contradictory assignments, Plaintiff's current counsel, during Plaintiff's Rule 30(b)(6) deposition on June 30, 2015, telephoned former counsel for Plaintiff who had overseen the assignments. ³³ As a result of that conversation, Plaintiff

has stipulated that the August 2010 assignment assigned to Camp Ne'er Too Late only those rights that remained after the November 2008 assignment to the individual shareholders of Ne'er Too Late Lodge. Thus, the parties agree that the individual shareholders—and not Camp Ne'er Too Late—were the actual assignees of the Ne'er Too Late Lodge's rights under the lease. Moreover, at no time did the individual shareholders either: (i) convey their rights back to Ne'er Too Late Lodge before the August 2010 transfer from Ne'er Too Late Lodge to Camp Ne'er Too Late or (ii) assign them directly to Camp Ne'er Too Late. 36

D. Camp Ne'er Too Late and East Resource's successorin-interest, East Resources Management, negotiate and execute the 2010 right-of-way agreement and addendum.

*5 In 2010, further right-of-way negotiations were held between the parties. On June 1, 2010, East Resources transferred its interest in the leased premises, including the lease and the 2009 right-of-way agreement, to East Resources Management. ³⁷ Mr. Bryant and Mark Schall were the landmen with whom Plaintiff negotiated in 2010. ³⁸ On October 19, 2010, Camp Ne'er Too Late and East Resources Management executed the 2010 right-of-way agreement, the second of two right-of-way agreements relating to the subject premises and the one that is largely responsible for this dispute. ³⁹

As initially presented to Plaintiff, the 2010 right-of-way agreement did not contain an addendum. ⁴⁰ When Plaintiff's representatives informed Mr. Bryant that they had some concerns regarding the proposal, Mr. Bryant sent Plaintiff a telefax of certain notes detailing the typical provisions found in an addendum and informed Plaintiff to "put [its] thoughts down and we will go from there." ⁴¹

No one from East Resources Management forbid Plaintiff from making changes to the proposed addendum. ⁴² In fact, Plaintiff proposed a number of terms and revisions to the addendum, many of which were accepted. ⁴³ David Schwoyer, Sr., recalls "revising some of the addendum language," as "things were going back and forth" between Plaintiff and East Resources Management's representatives. ⁴⁴

While it was revising the language of the addendum to the 2010 right-of-way agreement, Plaintiff was not represented by counsel. "We had somebody we could call, I guess, if we had a concern," David Schwoyer, Sr., remembered, "but nobody was involved I believe at this time with us." ⁴⁵ Rather than consult an experienced oil and gas lawyer, Plaintiff's representatives negotiated with East Resources Management on their own and made the textual revisions themselves, consulting one another and proposing amendments through group emails.

In one of those emails between brothers Robert and David Schwoyer, Sr., Robert Schwoyer writes "David, look at item 12 of our original gas lease and see if it applies...." ⁴⁶ David Schwoyer took his brother's question "[t]o basically address the fact that if we are going to assign a right-of-way, we want to make sure that we are consistent with the original oil and gas lease." ⁴⁷ Eventually, on October 12, 2010, Schwoyer would write to two other of Plaintiff's partners, "I tired [sic] sick of looking at the document as I have read, re-read, edited, deleted and added numerous items." ⁴⁸ Schwoyer went on to write, "Let's make sure we are saying what we need to say but lets [sic] get it done already!" ⁴⁹

What ultimately resulted from these drafts were certain revisions to the introductory paragraph of the addendum to the 2010 right-of-way agreement. David Schwoyer does not deny that he is the individual responsible for the drafting of the contested language. During his Rule 30(b) (6) deposition, Mr. Schwoyer was asked by Jeremy A. Mercer, Esquire, counsel for Defendant, "Were you the one who made the change to that paragraph to add that additional text...?" ⁵⁰ Mr. Schwoyer answered, "Yes." ⁵¹

*6 After Mr. Schwoyer's revisions were incorporated into the final version of the addendum to the 2010 right-of-way agreement on October 19, 2010, the introductory paragraph of that document read as follows:

This addendum is attached to and made part of that certain Right of Way Agreement dated October 19, 2010. If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the Right of Way Agreement or Original Oil

and Gas Lease and Addendum the following provisions, and the non conflicting terms of the Original Oil and Gas Lease and its Addendum, shall control and be deemed to supersede the printed terms of the Right of Way Agreement. ⁵²

When pressed as to the effect of this language during his Rule 30(b)(6) deposition, Mr. Schwoyer suggested that he intended the language to reference "back to and incorporate at least paragraph 12 of the addendum to the oil and gas lease." ⁵³ However, Mr. Schwoyer conceded that he failed to "specifically identify paragraph 12 in that text," even though he acknowledged that he "could have, if [he] wanted to, have put in the proposed addendum language that specifically referred to item 12 of the oil and gas lease." ⁵⁴ Furthermore, when asked whether he ever recalled discussing Paragraph 12's limitations on domestic gas with the landmen, Mr. Schwoyer responded, "I can't remember specifically what was said as far as whether or not we specifically told him about that." ⁵⁵

The parties agree that the 2010 right-of-way agreement contained an integration clause. ⁵⁶ Still, in its answer to Defendant's Statement of Facts, Plaintiff averred that its representatives "conveyed to Mark Shall [sic] that the reason that the second sentence of the first paragraph of the 2010 Right of Way addendum was put in there was because the Plaintiff had a concern that this document would change the protections in the Lease and the Plaintiff wanted to make sure the 2010 Right of Way and [sic] didn't change any of the protections that were already stated in the Lease." ⁵⁷ Moreover, Plaintiff contends that Mr. Schall provided estimates that Plaintiff's representatives could use to calculate projected revenue. ⁵⁸

Taking into account the existence of a valid integration clause and reading the portions of Mr. Schall's deposition to which Plaintiff cites for support, I cannot agree that Plaintiff has raised a genuine dispute as to any specific knowledge on Mr. Schall's part as to Plaintiff's purported concern with transportation of domestic gas. Instead, the pertinent portions of Mr. Schall's depositions reveal that the only concerns of which he was specifically informed involved water testing and expiration of the lease. ⁵⁹ In fact, Mr. Schall recalls informing Plaintiff during

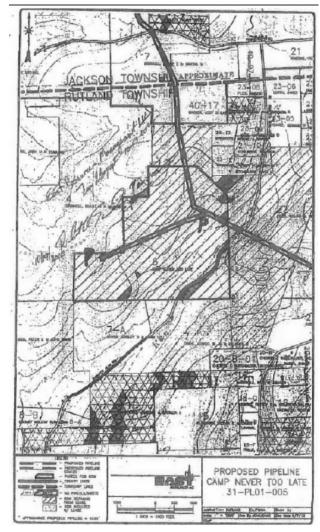
negotiations that "[W]e are putting the pipeline under the terms of the right-of-way agreement, and it's completely separate from your oil and gas lease." ⁶⁰ In addition, as explained more fully below, such extrinsic evidence or documents are hardly relevant where the text of the agreements is so clearly integrated.

*7 East Resources Management paid Plaintiff \$59,610.00 in consideration for the 2010 right-of-way agreement. 61 During Plaintiff's Rule 30(b)(6) deposition, counsel for Defendant tasked Mr. Schwoyer to offer any plausible, alternative explanation for why Defendant would pay Plaintiff nearly \$60,000.00 in excess consideration, if not to obtain the right to construct a more extensive pipeline capable of transporting nonnative gas. Unfortunately, Mr. Schwoyer offered no viable answers.

"So what additional rights are they getting under the right-of-way agreement, that they didn't have under the lease?" Mr. Mercer asked. "That I can't answer," Mr. Schwoyer responded. ⁶² "Did you ever ask 'What are they paying us 60,000 dollars for?" "No," Mr. Schwoyer said. ⁶³ Mr. Mercer repeatedly asked, "Did you ever consider 'Wait a minute, we are getting 60,000 dollars here, maybe they are getting something other than what they already had the right to do under the lease?" " and "They weren't getting any additional rights under your view than they had under the lease. But they were paying you 59,000 plus dollars for it?" ⁶⁴ In the Court's view, Plaintiff has failed to adequately address this critical question.

The 2010 right-of-way agreement also contained the following map of the proposed pipeline, depicted as Figure 1 below:

Figure 1. Map of Proposed Pipeline from 2010 Right-of-Way Agreement



The proposed pipeline is depicted as the thick black and white route beginning at the northcentral portion of the map and running south toward the center of the map, before continuing in a southeasterly direction toward the eastern boundary of the map. A second portion of the proposed pipeline, what the parties refer to as the "spur" line, is depicted connecting to the main portion of the pipeline near the center of the map and thereafter moving across the leased premises in a southwesterly direction. ⁶⁵

During Plaintiff's Rule 30(b)(6) deposition, Mr. Mercer asked Mr. Schwoyer to indicate on the map the location of the two well pads at issue with a capital letter "P." ⁶⁶ The first well pad, at the southwestern corner of the diagram, was a proposed or planned well pad. ⁶⁷ It was never built and in fact, the spur portion of the pipeline was never constructed. ⁶⁸ Moving eastward, the second well pad, which existed at the time, is denoted immediately below

that portion of the main pipeline that would connect with the spur section of the pipeline. ⁶⁹

The parties do not dispute that if the pipeline and pads were constructed as depicted on the above map, it would not be possible for gas to flow through both sections (the main and the spur sections) simultaneously while only transporting domestic gas. ⁷⁰ This is true because it is not possible for gas to flow in both a northward and southward direction through the pipeline at the same time. ⁷¹ Defendant contends that this consequence renders Plaintiff's argument as to the continued applicability of the lease addendum's domestic-gas-only provision (Paragraph 12) incompatible with the reality of the parties' 2010 right-of-way agreement. ⁷²

E. Camp Ne'er Too Late and SWEPI, LP, negotiate and execute the 2011 amendment to the 2010 right-of-way agreement.

*8 On December 31, 2010, Defendant acquired the rights to the lease and lease addendum, as well as the 2009 and 2010 right-of-way agreements. ⁷³ Thereafter, Plaintiff and Defendant began negotiating an amendment to the 2010 right-of-way agreement. ⁷⁴ At this time, Plaintiff still was unrepresented during negotiations and drafting of the pertinent agreement. ⁷⁵ That amendment was executed on December 2, 2011. ⁷⁶ Plaintiff was paid \$104,220.00 for executing the 2011 amendment, \$99,220.00 of which was in consideration for the amendment and \$5,000.00 of which was for the replanting of trees taken from the right-of-way. ⁷⁷

The purpose of the 2011 amendment was to expand the width of the 2010 right-of-way. ⁷⁸ It states that "[e]xcept as provided in this Amendment, all of the terms and provisions of the [2010 right-of-way agreement] remain in full force and effect." ⁷⁹ The 2011 amendment is a fully integrated contract, and nothing in the 2011 amendment specifically references Paragraph 12 of the lease addendum. ⁸⁰ Even though Plaintiff was never told by Al Wichter, the landman with whom its representatives now negotiated, that Defendant would definitely drill eleven wells on the property within a prescribed period of time, Plaintiff suggests that Mr. Wichter represented during negotiations that Defendant was going forward

with such plans. ⁸¹ The 2011 amendment, however, is silent as to those purported plans. ⁸²

In connection with the 2011 amendment, Robert Schwoyer signed three maps. Mr. Schwoyer made and initialed next to several "X" marks on both of the December 2, 2011, maps which indicated that those were things to which Plaintiff was not agreeing. ⁸³ The parties agree that by signing the two December 2, 2011 maps, Mr. Schwoyer was approving the location of the pipeline. ⁸⁴ Though Defendant contends Mr. Schwoyer was approving the final version of the pipeline, Plaintiff suggests Mr. Schwoyer was approving the location of the pipeline "at that time." ⁸⁵

Significantly, however, on January 25, 2012, Robert Schwoyer signed a third map, which is noted in his own handwriting at the top of the page and in preprinted text in the legend box, as the "final" version of the pipeline's layout. ⁸⁶ Again, the parties dispute whether Mr. Schwoyer's adoption of this map approved the final location of the pipeline or merely approved the location of the pipeline as it then stood. ⁸⁷ Nevertheless, the parties do not dispute that the January 25, 2012 map no longer depicts the portion of the pipeline that would connect the well on the property to the greater pipeline infrastructure. ⁸⁸ Without that connection line, the parties also do not dispute that gas could not be carried from any well on Plaintiff's property. ⁸⁹

*9 A visual comparison of the 2011 and 2012 maps, taken from Defendant's supporting brief and annotated by Defendant are shown below as Figure 2:

Figure 2. Comparison of the 2011 and 2012 Amendment Maps 90





F. Plaintiff enters into the 2012 surface use agreement with Defendant. Thereafter, Defendant constructs the pipeline.

On February 13, 2012, Plaintiff entered into a surface use agreement with Defendant. ⁹¹ The purpose of this agreement was to allow Defendant to store equipment and supplies on the well pad on the subject premises during construction of the pipeline. ⁹² Plaintiff's representatives never discussed why Defendant would need the agreement to use the well pad if the lease already covered such rights. ⁹³ Plaintiff received \$33,600.00 in additional consideration for allowing Defendant to use the well pad to store equipment and supplies for a six-month period. ⁹⁴

Shortly thereafter, construction on the pipeline began. Robert Schwoyer lives next door to the subject property, and he admits that during construction he visited the property almost every day. ⁹⁵ By October 1, 2012, the pipeline project was complete and only non-native gas was flowing through the pipeline. ⁹⁶ At that, time Plaintiff was aware that the only well on the property was not connected to the pipeline, rendering that well "shut-in." ⁹⁷ Moreover, the "spur line" section of the pipeline had not been constructed. ⁹⁸ Yet, Plaintiff contends that it was "under the impression" that further pipeline construction and well development would be completed. ⁹⁹

Under the Lease, Plaintiff was to receive yearly shut-in payments of \$1,150.00 when a well was drilled and shut-in on the Property. ¹⁰⁰ The parties do not dispute that Plaintiff has received the shut-in payments required by the lease. ¹⁰¹ On November 6, 2013, Plaintiff cashed the first shut-in check. ¹⁰² At the time that Plaintiff cashed the first shut-in check, it was aware for more than a year that gas was flowing through the pipeline but that no portion of that gas was produced from any wells on the leased

premises or pooled properties. ¹⁰³ Plaintiff contends that it still remained "under the impression" that further work on the pipeline needed to be completed prior to the drilling of additional wells on its property. ¹⁰⁴ Plaintiff has returned subsequent shut-in checks to Defendant. ¹⁰⁵

G. Plaintiff sends Shell the October 1, 2013 "Shattered Dreams" Letter.

*10 On October 1, 2013, one month before cashing the shut-in check, David Schwoyer, Sr., provided Robert A. Schwoyer a letter, which Robert A. Schwoyer sent to Shell on behalf of Plaintiff. ¹⁰⁶ During his deposition, David Schwoyer admitted that the letter "was written by [David Schwoyer] and Robert Schwoyer" and that the facts in the letter "came from [David Schwoyer] as well as from [Robert Schwoyer]." ¹⁰⁷

"[W]e now find ourselves at a loss," the Schwoyers, on behalf of Plaintiff, wrote. ¹⁰⁸ Many of their neighbors have "similar" stories, but each "have their own disappointments." ¹⁰⁹ Among other admissions, the letter acknowledges that Plaintiff has been aware that since the end of June 2010, "Shell drilled and capped the well and all activities since then have completely ceased on the pad and well site." ¹¹⁰ The letter also indicates that at the time of its writing, Plaintiff's members were aware that "[t]he pipeline has been in place for over a year and as far as we know it is fully operational." ¹¹¹

"[I]t has been over a year since the pipeline was completed and there ha[s] been no further communications to us from Shell regarding this matter," the letter continues. ¹¹² In fact, Plaintiff admits in the letter to being informed by a Shell representative in May 2013 that "our location was not on the fracking schedule for this year (2013)." ¹¹³ The letter indicates that in late May 2013, a representative for Plaintiff was "informed [] that Shell had no intentions of doing anything else at our location." ¹¹⁴

The whole situation resulted in "shattered dreams," Plaintiff's letter suggests. "We hope that after reading our story 'that someone in your organization' has the courtesy, ethical value and integrity, to finally tell us what the true plans if there are any regarding our location." ¹¹⁵ "Even with all this we still have some partial dream that

Shell will live up to the written and verbal commitments East and Shell have made with our organization over the past 5 years to expand our pad, drill and frack the wells as stated." ¹¹⁶ It does not appear from the record that Defendant responded to Plaintiff's letter. ¹¹⁷

H. Plaintiff initiates this civil action. Defendant files a timely Motion for Summary Judgment, but Plaintiff files a late Motion for Summary Judgment, even after receiving an extension from the Court.

On July 30, 2014, Plaintiff initiated this litigation in the Court of Common Pleas of Tioga County, Pennsylvania, seeking injunctive and monetary relief for the alleged breach of contract. ¹¹⁸ Defendant was served on August 5, 2014. On September 2, 2014, Defendant properly removed the action to this Court. ¹¹⁹

*11 The dispositive motions deadline of August 7, 2015 was set by Order of this Court on June 25, 2015. 120 On August 7, 2015, Defendant filed the instant Motion for Summary Judgment, but Plaintiff filed no dispositive motions. 121 On August 10, 2015, three days after the deadline had passed, Plaintiff filed a motion seeking an extension of time to file a dispositive motion, which Defendant opposed. 122 Notwithstanding Defendant's opposition, this Court granted Plaintiff leave to file a dispositive motion "no later than August 28, 2015 at 5:00 p.m." 123 The Court made clear that this was a "strict deadline" and that "no further extensions of time will be granted." 124 Plaintiff filed the instant Motion for Summary Judgment on August 28, 2015 at 5:16 p.m., sixteen minutes late. 125

Because there is no genuine dispute of material fact that the 2010 right-of-way agreement fails to incorporate Paragraph 12 of the lease addendum, Defendant committed no breach by transporting non-native gas through the subject pipeline. Therefore, I will enter judgment in favor of Defendant in accordance with the following reasoning.

II. LAW

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." ¹²⁶ Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." ¹²⁷ "Facts that could alter the outcome are 'material facts,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." ¹²⁸

"A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff's case." ¹²⁹ "A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a <u>prima facie</u> case under applicable substantive law." ¹³⁰

"[T]he inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." ¹³¹ Thus, "[i]f the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." 132 "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." ¹³³ "The judge's inquiry, therefore, unavoidably asks... 'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed," "134

*12 "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." ¹³⁵ "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates

that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." ¹³⁶

Where the movant properly supports his motion, the nonmoving party, to avoid summary judgment, must answer by setting forth "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ¹³⁷ For movants and nonmovants alike, the assertion "that a fact cannot be or is genuinely disputed" must be supported by: (i) "citing to particular parts of materials in the record" that go beyond "mere allegations"; (ii) "showing that the materials cited do not establish the absence or presence of a genuine dispute"; or (iii) "showing... that an adverse party cannot produce admissible evidence to support the fact." ¹³⁸

"When opposing summary judgment, the non-movant may not rest upon mere allegations, but rather must 'identify those facts of record which would contradict the facts identified by the movant.' "139 Moreover, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may...consider the fact undisputed for purposes of the motion." 140 On motion for summary judgment, "[t]he court need consider only the cited materials, but it may consider other materials in the record." 141

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 142 "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." 143 "If the evidence is merely colorable...or is not significantly probative, summary judgment may be granted." 144

III. ANALYSIS

In accordance with the following reasoning, I hold that Plaintiff has standing to sue because it was a signatory to the 2010 right-of-way agreement, which Plaintiff alleges conditionally incorporates Paragraph 12 of the 2008 lease addendum.

Reaching the merits, I further hold that summary judgment is appropriately granted in Defendant's favor because there is no genuine dispute of any material fact that the 2010 right-of-way agreement fails to incorporate Paragraph 12 of the lease addendum and that the Defendant therefore did not breach the 2010 right-of-way agreement by constructing a pipeline that transported non-native gas.

In addition, I hold that Plaintiff's course of conduct here is sufficient to conclude that it waived any expectation or right it had preserve the domestic gas limitation in its subsequent dealings with Defendant and is thereby estopped from now asserting such a claim.

A. Plaintiff Has Standing To Sue Because It Was A Signatory To The 2010 Right-Of-Way Agreement, Which Plaintiff Alleges Conditionally Incorporates Paragraph 12 Of The 2008 Lease Addendum. The Course Of The Parties' Subsequent Dealings Confirms This Conclusion.

*13 [1] As a preliminary matter, Defendant argues that Plaintiff lacks standing to sue for breach of the lease. This must be the case, Defendant contends, because Plaintiff was not a signatory to or an intended third party beneficiary of the lease, and thereafter Plaintiff was never properly assigned any rights under the lease.

Specifically, as the parties' statements of fact recount, the lease was executed on June 17, 2008 between the not-for-profit organization Ne'er Too Late Lodge and SWEPI's predecessor-in-interest, East Resources, Inc. ¹⁴⁵ Though the validity of the assignment of rights from East Resources, to East Resources Management, and ultimately to SWEPI is uncontested, Defendant takes issue with the purported transfer of rights that occurred between Ne'er Too Late Lodge and Camp Ne'er Too Late, LP.

Defendant's challenge centers on the two inconsistent transactions that transpired after Ne'er Too Late Lodge signed the lease. Specifically, on November 14, 2008, five months after the lease was executed, Ne'er Too Late Lodge assigned all of its rights under the lease to its individual shareholders. ¹⁴⁶ As part of the assignment, each of Ne'er Too Late Lodge's nine shareholders accepted an interest in the rights under lease in proportion to their ownership share in Ne'er Too Late Lodge. ¹⁴⁷ That assignment was never recorded. ¹⁴⁸

Approximately eighteen months later in April 2010, those same nine shareholders of Ne'er Too Late Lodge formed Camp Ne'er Too Late, LP. ¹⁴⁹ Curiously, Ne'er Too Late Lodge, on August 2, 2010, once again assigned its rights under the lease, this time to Camp Ne'er Too Late. ¹⁵⁰ Unlike the first assignment of the lease rights to Ne'er Too Late Lodge's shareholders, this subsequent assignment was recorded in the Recorder of Deeds Office of Tioga County, Pennsylvania. ¹⁵¹

As fully recited in the facts section above, Plaintiff has stipulated that the August 2010 assignment assigned to the Camp Ne'er Too Late only those rights that remained after the November 2008 assignment to the individual shareholders of Ne'er Too Late Lodge. Thus, the parties agree that the individual shareholders—and not Camp Ne'er Too Late—were the actual assignees of the Ne'er Too Late Lodge's rights under the lease. 153

*14 The lease rights having vested to the individual shareholders, Defendant points out that at no time did the individual shareholders either: (i) convey those rights back to Lodge before Lodge assigned them to Camp or (ii) assign them directly to Camp. ¹⁵⁴ Accordingly, as Defendant would have it, Plaintiff does not have standing to enforce any rights pursuant to the lease executed between Defendant's predecessor-in-interest and Ne'er Too Late Lodge, because Plaintiff never received an assignment of those rights in full.

Plaintiff's primary argument to the contrary is that Defendant has overlooked the fact that although Plaintiff was not a party to the original lease and lease addendum, it was a party to the 2010 right-of-way agreement. Because the addendum to the 2010 right-of-way agreement references the lease and lease addendum, Plaintiff contends that it does have the requisite standing to pursue the instant claim. ¹⁵⁵

[2] In my view, the standing dispute in this matter essentially boils down to the following question: Does a signatory to an agreement have standing to advance a breach of contract claim by alleging that the disputed agreement incorporates unfulfilled provisions of an earlier agreement to which the plaintiff was not a signatory?

The answer, according to Pennsylvania contract law and everyday practice, is yes. ¹⁵⁶

Although I agree with Plaintiff on its standing to bring the instant suit, I find it important to note that its success on this issue comes at a very narrow margin. Specifically, the outcome would likely be different if the parties here had never executed the subsequent right-of-way agreements, and Plaintiff was forced to bring its claim directly under the lease or its addendum. In that sense, this case is much more focused upon interpretation of the 2010 right-of-way agreement's addendum than it is upon so analyzing the terms of the initial lease. Because of that, Plaintiff possesses a sufficient basis to proceed with this action.

[3] At this juncture, however, it is also important to recognize that the outcome of the standing issue in Plaintiff's favor is not determinative as to the merits of its claim. The issues of standing and breach in this dispute, though similar in some respects, are necessarily distinct as a matter of law. The issue of standing is a preliminary one, resolvable by a federal court at the outset of its disposition and before reaching the merits. As the United States Court of Appeals for the Third Circuit has observed in an analogous context, "our determination of the likelihood of success on the merits of the case is a separate inquiry from the threshold issue of Article III standing. To demonstrate its standing to sue, a plaintiff must only allege that they have suffered sufficient injury to comply with Article III's 'case or controversy' requirement." 157

*15 That is to say, although Plaintiff has standing to sue for a breach of the 2010 right-of-way agreement by alleging a derivative breach of the lease addendum, it still must establish that the pertinent provision on which it relies, Paragraph 12 of the lease addendum, was clearly incorporated into the 2010 right-of-way agreement and thereafter violated. In that sense, because the contested provision was alleged to have been incorporated into the 2010 right-of-way agreement in conditional fashion, Plaintiff must first prove that the conditions necessitating such incorporation were actually satisfied. This is the determination to which the Court turns in Part III.B.

[4] [5] "The requirement of standing under Pennsylvania law is prudential in nature, and stems from the principle that judicial intervention is appropriate only where the underlying controversy is real and concrete, rather than

abstract." ¹⁵⁸ "A party has standing to bring a cause of action if it is 'aggrieved' by the actions complained of, that is, if its interest in the outcome of the litigation is substantial, direct, and immediate." ¹⁵⁹ "A 'substantial' interest is one that surpasses the common interest of all citizens in procuring obedience to the law." ¹⁶⁰ "A 'direct' interest requires a showing that the matter complained of caused harm to the party." ¹⁶¹ "An 'immediate' interest involves the nature of the causal connection, see id. and signifies that judicial intervention is ordinarily inappropriate when the harm alleged is remote and speculative." ¹⁶² Thus, "[s]tanding requires a party to have a substantial interest in the subject matter of the litigation; the interest must be direct; and the interest must be immediate and not a remote consequence." ¹⁶³

In ACTEGA Kelstar, Inc. v. Musselwhite, for instance, the United States District Court for the District of New Jersey interpreted New Jersey state contract law, which closely tracks Pennsylvania law on the issue of enforcement by non-signatories. 164 The court in **ACTEGA** addressed whether a plaintiff corporation that did not sign an original employment contract could enforce a restrictive covenant in that contract solely as a result of that corporation having executed an amended agreement that incorporated the contested restrictive covenants. 165 The court held that it could. "[T]hat Plaintiff was not a party to the original employment agreement does not prevent Plaintiff from seeking to enforce the restrictive covenants," the court confirmed, since "Plaintiff is a party to the Amendment, in which Defendant expressly agreed that he would be bound by the restrictive covenants in the [original] contract." 166

Furthermore, in a related setting, the Supreme Court of Pennsylvania has recognized that the creditor of a trust who was not a named in the trust's originating documents may nevertheless compel an accounting of such trust if the creditor later enters into agreements premised upon the trust's creation. "Although appellant was not a party to the original agreement," the Supreme Court of Pennsylvania wrote, "subsequent to its date, and after the execution of the deed, he entered into an extension agreement which recognized the status of affairs created by the trust deed and its incorporated agreement." ¹⁶⁷

*16 Miller v. Butler, a matter before the United States District Court for the District of New Jersey, involved a breach of contract suit brought by an individual investor against an investment fund that had been organized as a limited liability company. ¹⁶⁸ Miller confirms that courts may find adequate standing in contract disputes where the plaintiffs themselves contributed the contested property, even if those plaintiffs were not parties to the underlying contract. In that case, the individual plaintiff was not a member of the defendant limited liability company, but a separate limited liability company that he owned was a member. ¹⁶⁹ The defendant limited liability company raised the issue of standing as to plaintiff's breach of contract claim, as the plaintiff personally was not a signatory to the defendant's operating agreement. ¹⁷⁰ The district court rejected that argument and reasoned that "Plaintiff has standing since the funds to purchase the [contested fund] were transferred by and from him." 171

Turning to the instant matter, recall that the final version of the introductory paragraph of the addendum to the 2010 right-of-way agreement reads as follows:

This addendum is attached to and made part of that certain Right of Way Agreement dated October 19, 2010. If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the Right of Way Agreement or Original Oil and Gas Lease and Addendum the following provisions, and the non conflicting terms of the Original Oil and Gas Lease and its Addendum, shall control and be deemed to supersede the printed terms of the Right of Way Agreement. 172

Considering the above language in light of the foregoing authorities, I would find that Plaintiff has adequately established standing to pursue its claims here, since it was party to subsequent agreements that allegedly incorporated the contested provisions. In this manner, Plaintiff enjoys standing not directly via the lease and addendum but derivatively as a signatory to subsequent amendments that referenced those documents

and contemplated conditional incorporation of certain of the documents' terms.

By way of example, contemplate the scenario in which the second sentence of the above-quoted paragraph from Plaintiff's 2010 right-of-way agreement began not with "If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the Right of Way Agreement or Original Oil and Gas Lease and Addendum" but with "If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the 2008 Merger Agreement between Company A, Inc., and Company B., Inc." or with "If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the 2008 Right-of-Way Agreement between Tioga County, Pennsylvania Landowner John Doe and SWEPI, LP."

I hardly think that whether Plaintiff here was a party to the hypothetical 2008 Merger Agreement or the hypothetical 2008 Right-of-Way Agreement in Tioga County makes any difference in the determination of whether Plaintiff would have standing to sue for a breach of the hypothesized right-of-way agreements. Those terms are effected in a derivative rather than a direct sense, but they do not preclude Plaintiff from suing based upon the agreement it did in fact sign.

[6] [7] In addition, courts interpreting common law contract principles agree that "a party may adopt and be bound to a contract to which it was not originally a signatory." ¹⁷³ Such construction is particularly apt where the "plaintiff had not been created at the time the agreement was drafted and signed" but "had an explicit relationship" to the agreement. ¹⁷⁴ "There are no magic words to explicitly adopt a contract." ¹⁷⁵ "Third parties to a contract become parties who are bound by the contract's terms by either explicitly or implicitly adopting the agreement." ¹⁷⁶

*17 [8] [9] "Express adoption occurs when a successor adopts a contract of a predecessor as its own." 177 "Implicit adoption occurs when a party accepts benefits intended for third party beneficiary." 178 "Courts will often find implicit adoption when a party who has received

benefits of a contract then tries to avoid burdens imposed by the same contract." ¹⁷⁹

[10] [11] [12] Relatedly, contracts may be implied from the course of the parties' conduct. For instance, "as a result of plaintiff's actions, statements, and the benefits it received as a direct result of the [agreement], the [agreement] can be held to be an implied in fact contract as it relates to plaintiff." ¹⁸⁰ "An implied in fact contract has the legal equivalency of an express contract." ¹⁸¹ As the Superior Court of Pennsylvania has concluded, "[a] contract implied in fact can be found by looking to the surrounding facts of the parties' dealings." ¹⁸² "Implied contracts... arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract." ¹⁸³

The Third Circuit has explained that application of such doctrines, like those of adoption, equitable estoppel, and implied-in-fact contracts, "prevent[s] a non-signatory from embracing a contract, and then turning its back on the portions of the contract...that it finds distasteful." ¹⁸⁴ In line with these common law contract principles, the particular course of dealing here compels the conclusion that Plaintiff has standing to sue based upon its allegations that certain of the lease addendum's provisions were incorporated into the 2010 right-of-way agreement and thereafter violated.

For instance, Defendant does not contest that after Plaintiff was formed, several negotiations between Plaintiff and Defendant were held with the purpose of agreeing to several right-of-way agreements. 185 Those negotiations between Plaintiff and Defendant resulted in two right-of-way agreements, which although distinct, referenced the initial lease and addendum. 186 Moreover, Defendant or its predecessor-in-interest East Resources Management compensated Plaintiff \$59,610.00 and \$99,220.00, respectively, in consideration for the 2010 and 2011 right-of-way agreements. ¹⁸⁷ As Plaintiff suggests, Defendant "cannot have it both ways by alleging that Plaintiff entered into various fully integrated agreements, and was paid according to those agreements, including shut-in payments under the Lease, while also asserting that Plaintiff does not have standing to bring suit for breach of the Lease." 188

I think it enough that both the text of the 2010 rightof-way agreement and the course of the parties' dealings afford Plaintiff standing and permit the Court to advance to the merits.

B. Summary Judgment Is Appropriate In Favor Of
Defendant Because There Is No Genuine Dispute
Of Material Fact That The 2010 Right-OfWay Agreement Fails To Incorporate Paragraph
12 Of The Lease Addendum And That The
Defendant Therefore Did Not Breach The 2010
Right-Of-Way Agreement By Constructing A
Pipeline That Transported Non-Native Gas.

*18 [13] [14] "The court can grant summary judgment on an issue of contract interpretation if the contractual language being interpreted 'is subject to only one reasonable interpretation.' "189 "Under Pennsylvania law, the Court must determine, as a matter of law, whether the relevant contract terms are ambiguous." 190 "If the contract is unambiguous, then it is for the Court to decide whether the contract was breached." 191

[15] [16] Contract interpretation is an "attempt to ascertain the intent of the parties and give it effect," and "[w]hen the words of an agreement are clear and unambiguous, the intent of the parties is to be ascertained from the language used in the agreement." ¹⁹² Where the words are ambiguous, on the other hand, "parol evidence is admissible to explain or clarify or resolve the ambiguity." ¹⁹³

[17] When determining whether the language of an agreement is clear or ambiguous, the Court assumes that the parties intend "all provisions in the agreement [to] be construed together and...given effect." ¹⁹⁴ The "focus ...is upon the terms of the agreement as manifestly expressed, rather than as, perhaps, silently intended." ¹⁹⁵

[18] Accordingly, the Court assumes generally that the parties have given words their "commonly accepted and plain meaning," but also recognizes "that every agreement is made and to be construed with due regard to the known characteristics of the business to which it relates...and hence the language used in a contract will be construed according to its purport in the particular business, although this results in an entirely different

conclusion from what would have been reached had the usual meaning been ascribed to those words." ¹⁹⁶

[19] Interpretation is not concerned with the parties "post hoc judgment [s]...as to what should have been," and the Court will not "rely upon a strained contrivancy" to establish ambiguity. ¹⁹⁷ "The Court, rather, seeks to be faithful to the meaning that the parties—given their positions at the time of contracting—would have given their words ex ante." ¹⁹⁸

[20] [21] Moreover, "[t]he issue of whether a writing constitutes an integrated contract is a question of law." ¹⁹⁹ "A contract is integrated if it represents a final and complete expression of the parties' agreement." ²⁰⁰ "Where a contract purports to be a complete legal obligation without any doubt as to its object or extent, it is presumed to reflect the whole legal right of the parties." ²⁰¹

*19 [22] "[A] lease is in the nature of a contract and is controlled by principles of contract law." ²⁰² "It must be construed in accordance with the terms of the agreement as manifestly expressed, and the accepted and plain meaning of the language used, rather than the silent intentions of the contracting parties, determines the construction to be given the agreement." ²⁰³

[23] "The best evidence of what parties to a written agreement intend is what they say in their writing." ²⁰⁴ Thus, the Supreme Court of Pennsylvania has acknowledged that if an agreement's words "are clearly susceptible of but one interpretation," the scope of that agreement "must be found in them alone." ²⁰⁵ "What ought to have passed...or what ought to be understood as having passed, is never a question for a court, when the grant itself, in words not to be misunderstood, states exactly what did pass." ²⁰⁶ In cases of such clarity, "[t]he law will not imply a different contract from that which the parties themselves made." ²⁰⁷

1. The lease and the subsequent right-of-way agreements are separate legal documents that constitute distinct agreements. Therefore, Plaintiff can prevail only if Paragraph 12 of the lease addendum was

incorporated by the introductory paragraph of the addendum to the 2010 right-of-way agreement.

[24] As a starting point, I must determine whether the agreements at issue are appropriately viewed as separate writings constituting a single transaction or separate writings to be treated as distinct contractual agreements. The latter is more true to the factual backdrop in this case.

[25] Even if there exists "a relationship between the work performed" under one agreement and that contemplated by another, the presumption, absent indication otherwise, is that they constitute "two separate contracts, not two separate writings that were to be construed as two parts of one contract." ²⁰⁸ This is true even if the two agreements "concern the same subject matter" or "are part of the same bargain." ²⁰⁹ A key consideration is whether, upon execution of one agreement, the parties "have established rights as between themselves." ²¹⁰

In discerning whether "two agreements, while related, were intended to be separate agreements," courts have considered the following factors:

- (1) whether the agreements were executed at different times;
- (2) whether the agreements related to different subject matters;
- (3) whether the agreements were not made between the same parties;
- (4) whether the agreements contained integration clauses:
- (5) whether one agreement could survive should the other be terminated;
- (6) whether the agreements were intended as consideration for one another;
- (7) whether the agreements contained different choice of law or dispute resolution provisions; and
- *20 (8) whether subsequent amendments to one agreement have left similar provisions of the other agreement unchanged. ²¹¹

Considering all of the facts and circumstances applicable to the instant matter, I am satisfied that the original

2008 oil and gas lease with addendum was intended to function as an agreement distinct from the subsequent 2010 pipeline right-of-way and addendum. Despite the fact that the agreements were executed between the same parties (or their predecessors-in-interest) and concern the same general economic activity (natural gas drilling), the remainder of the circumstances that I have considered counsel for treating these agreements as distinct contracts.

Most apparently, the agreements were the result of several temporally distinct sets of negotiations, regarded several separate contractual rights, involved several forms of consideration paid, and ultimately resulted in several separate agreements, each with its own integration clause. Critically, the textual differences between the 2008 lease and the 2010 right-of-way agreement signal a distinction in the types of contractual rights each agreement bestowed upon Defendant. On one hand, the 2008 lease granted Defendant the right to drill and maintain wells on Plaintiff's property, while also constructing a pipeline to transport native gas only. Two years later, however, the parties found it necessary to negotiate as to construction of a pipeline not only capable of carrying non-native gas, but also constructed with certain other geographic modifications than initially planned. One need only ask: if Plaintiff's well was to cease production, would Defendant be forced to tear up the existing stretch of pipeline on the leased premises, or vice versa? Clearly, the answer is no, not only in a theoretical sense, but also because that precise separation of such rights has already played itself out in this matter.

Plaintiff cites to Southwestern Energy Production Co. v. Forest Resources, LLC, which according to Plaintiff's opposition brief, stands for the proposition that "where several documents are made as part of one transaction, they will be read together and each will be construed with reference to the others even if the documents were executed at different times and do not in terms refer to each other." ²¹² That argument relies on a fallacious premise and would also otherwise requires the explicit incorporation of one document's terms into the second, which is not the case here.

The faulty premise inapplicable to this matter is that cases like <u>Southwestern Energy</u> rely on the disputed documents having been made "as part of one transaction." ²¹³ Specifically, <u>Southwestern Energy</u> involved a dispute between an initial oil and gas lease and two subsequent

letter agreements that explicitly amended certain terms of the original lease. ²¹⁴ In <u>Southwestern Energy</u>, the Honorable Sallie Updyke Mundy of the Superior Court of Pennsylvania made clear that "by their own terms," the agreements at issue "reference and incorporate each other with the clear intent they should be interpreted as a single agreement." ²¹⁵ Quite opposite from the facts at hand, one of the two subsequent lease amendments in <u>Southwestern Energy</u> even "identifie[d] itself as an amendment of the [prior] [a]greement, not an independent collateral agreement." ²¹⁶ Such is simply not true of the course of dealing in this case as recited above.

*21 Because the 2008 oil and natural gas lease and addendum and the subsequent 2010 pipeline right-of-way agreement and addendum are distinct agreements, I must next consider whether there is any genuine dispute of material fact that Paragraph 12 of the lease addendum was not incorporated by the introductory paragraph of the addendum to the 2010 right-of-way agreement.

2. There is no genuine dispute of material fact that Paragraph 12 of the lease addendum was not incorporated by the introductory paragraph of the addendum to the 2010 right-of-way agreement.

[26] "[U]nder Pennsylvania law, incorporation by reference is proper where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." ²¹⁷ Another federal court interpreting Pennsylvania law has instructed that "[t]he doctrine of incorporation by reference dictates that where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." ²¹⁸

[27] "Incorporation by reference is a question of law." ²¹⁹ It "requires a reference in one document to the terms of another. Moreover, the incorporating document must not only refer to the incorporated document, it must bring the terms of the incorporated document into itself as if fully set out." ²²⁰

[28] As the facts here reveal, evidence of an intent between the parties to incorporate the contested provisions from the 2008 lease agreement into the subsequent 2010 right-of-way agreement is strained at best in an everyday sense and wholly inoperative from a legal perspective. The text of the introductory paragraph of the addendum to the 2010 right-of-way agreement is the cornerstone of my determination. It reads as follows:

This addendum is attached to and made part of that certain Right of Way Agreement dated October 19, 2010. If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the Right of Way Agreement or Original Oil and Gas Lease and Addendum the following provisions, and the non conflicting terms of the Original Oil and Gas Lease and its Addendum, shall control and be deemed to supersede the printed terms of the Right of Way Agreement. 221

For all intents and purposes, the above-quoted language is the sole source of support upon which Plaintiff bases its argument. It is too insubstantial a showing to avoid summary judgment. The first inquiry goes to the paragraph's ambiguity, of which I would determine there is none, and that is the only viable interpretation.

There is, for instance, no ambiguity as to the conditional nature of incorporation: "If any of the following provisions conflict with or are inconsistent with any of the printed provisions or terms of the Right of Way Agreement or Original Oil and Gas Lease and Addendum" is the condition's antecedent. Absent any evident conflict between one of the enumerated provisions of the 2010 right-of-way agreement's addendum, incorporation of any term from any other document is textually foreclosed.

*22 Notably, none of the terms in the 2010 right-of-way agreement's addendum address the distinction between native and non-native gas at all. What would have been the obvious course of action by a party who sought above all else to preserve the native gas requirement? Certainly, it would have been to include an explicit

provision referencing the preservation and incorporation of Paragraph 12 of the original lease's addendum into all subsequent right-of-way agreements. At least that much would have been apparent to a legal professional reasonably practiced in the arena of oil and gas law. In effect, Plaintiff would have been far better off to have simply said more with less.

Moreover, upon review of the parties' arguments as to the existence of any patent conflicts, it would be clear to any reasonable trier of fact that no such conflicts exist. Plaintiff's sole and rather tepid attempt to present conflicting terms is that the 2010 right-of-way agreement states that Defendant "shall pay reasonable damages which, if any, may arise to crops, fences, buildings, and drain tile from laying operating, maintaining, repairing, replacing and removing said pipeline(s)," whereas the addendum to that agreement requires Defendant to "promptly replace any barrier, including but not limited to fences and stone walls removed by [Defendant] during the operations on said land." 222

Stepping back and taking a broad view of things, that is an awkward argument. In the first instance, were Plaintiff correct, that would effectively mean that the parties entered into a right-of-way agreement whose terms were made immediately ineffective upon simultaneous execution of the addendum. "[I]f the plain meaning of a contract term would lead to an interpretation that is absurd and unreasonable, Pennsylvania contract law allows a court to construe the contract otherwise in order to reach the only sensible and reasonable interpretation of the contract." 223 If there exists a conflict between the provisions of the right-of-way and its addendum now, then there existed a conflict the moment documents were brought to fruition, rendering the right-of-way agreement ineffective, according to Plaintiff. That would lead to the most absurd of consequences and tellingly, is a consequence of Plaintiff's failure to simply include plain language as to the native gas restriction that would have glaringly conflicted with Paragraph 12 of the lease addendum without such interpretive strain.

Secondly, Plaintiff's contention that a conflict exists between a provision that requires replacement of a removed fence and another that mandates a reasonable payment for damage to a retained fence is without merit on other grounds. As Defendant adequately outlines in its reply brief, those provisions co-exist "harmoniously"

so as to cover two distinct scenarios: the first, outright replacement and the second, payment for minor repairs short of those requiring a new fence altogether.

Thirdly, even if there were a conflict as to the repair or replacement of fences, the Court is at an interpretive loss as to how such conflict would justify complete eradication of the right-of-way agreement rather than meticulous substitution of the original conflicted term regarding fences. That the parties conditioned the entirety of the right-of-way agreement on the discovery of such picayune distinctions is hard to imagine, both as a matter of practice and common sense.

The more charitable interpretation, and truly the only reasonable one, is that where a conflict exists between a term in the lease or right-of-way agreement and a term in the right-of-way agreement's addendum, then as stated, that conflicting provision of the addendum would supersede the conflicted term of the right-of-way agreement. Nowhere from the quoted language can it be discerned that a conflict involving a single fence post would nullify the remaining non-conflicting terms of the agreement and require halting the pipeline. That is certainly not what the parties bargained for.

*23 [29] Having concluded that there is simply no ambiguity as to whether Paragraph 12 of the lease addendum was incorporated by reference into the subsequent right-of-way agreement or addendum, I would add that the record in this case quite convincingly demonstrates that Plaintiff's representative played a significant role in drafting the contested language, requiring that any such ambiguity should nevertheless be construed in favor of Defendant. "[U]nder the rule of contra proferentem, any ambiguous language in a contract is construed against the drafter and in favor of the other party if the latter's interpretation is reasonable." 224 Not only was David Schwoyer, Sr., admittedly instrumental in the drafting of the contested addendum language, but it is precisely his choice of words from which the present dispute flows.

Finally, although it follows logically from the preceding discussion, it is worth explicitly holding that because Paragraph 12 of the lease addendum was not properly incorporated into any subsequent agreement, Defendant committed no breach when it used the subject pipeline to transport non-native gas. Neither has Plaintiff adduced

any contractual language indicating that Defendant has breached its obligations by failing to develop any additional wells on the leased premises. In light of the highly undulant nature of the industry's business cycle, this Court finds it necessary to construe such "failure to develop" claims with a hesitant perspective. To that end, federal courts must "demonstrate[] a measured temperance" when disposing of such claims, "recognizing full well that it is not the judiciary's place to substitute its own judgment for that of a business manager whose dayto-day closeness with his firm's operations commands a certain deference." 225

C. Plaintiff's Course Of Conduct Is Sufficient To Conclude That It Waived Any Expectation Or Right To Preserve The Domestic Gas Limitation. Plaintiff Is Thereby Estopped From Now Asserting Such A Claim.

relinquishing or abandoning some known right, claim or privilege." 226 "To constitute a waiver of legal right, there must be a clear, unequivocal and decisive act of the party with knowledge of such right and an evident purpose to surrender it." 227 "Waiver is essentially a matter of intention." 228 "A waiver may be express or implied, but in the absence of an express agreement a waiver will not be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to." 229

[34] As such, "[w]aiver can be express or implied from conduct in situations that would support equitable estoppel." ²³⁰ "Equitable estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts." ²³¹

*24 [35] Applying these doctrines to the context of real property, the Superior Court of Pennsylvania has recognized that "[w]hen an owner of land, with full knowledge of the facts, tacitly permits another to do acts upon the land, a license is implied." 232 Although such permission is in certain circumstances revocable, it

"may become irrevocable when the person granted the license has expended money and treated the property in a manner that they would not have treated it, but for the license." 233

In Zivari v. Willis, for example, the Superior Court of Pennsylvania found the doctrines of waiver and equitable estoppel appropriate in a property dispute involving access to land. ²³⁴ That case involved neighbors whose properties abutted each other in a cul-de-sac development. ²³⁵ One of the neighbors sought to remove his driveway and situate it differently on his land such that access to from his new driveway to the public culde-sac required him to briefly travel upon his neighbor's private road. 236 When the neighboring owner of the private road observed the construction, he remarked, "Well of course, I'll let you use it, but you should have [30] [31] [32] "A waiver in law is the act of intentionally asked." 237 When the owner of the private road later challenged his neighbor's using the road, the Superior Court rejected the owner's claim on the grounds of waiver and equitable estoppel, noting that "once appellees relied on this statement to their detriment, appellants are estopped from denying appellees access to the road." ²³⁸

> [36] Despite its failure to incorporate Paragraph 12 of the lease addendum into subsequent agreements, I find that Plaintiff's course of conduct after signing the initial lease suggests both that the provision had been waived and that Plaintiff should be estopped from asserting a claim based upon that provision. Several of the factual circumstances of this dispute support such a finding. First, Plaintiff accepted significant consideration above and beyond what the lease and addendum required when it entered into the subsequent right-of-way agreements. Not only does this support the individual nature of such agreements, but it also shows that Defendant paid Plaintiff certain extra consideration to surrender additional contractual rights that Defendant did not already possess.

Moreover, the very course of conduct through which Plaintiff continued to deal with Defendant suggests that its members were willing to work with Defendant on an extended basis. Even though the relationship appears to have been far from perfect, it was also apparently far from irreparable for the majority of its existence. At any time after 2008, Plaintiff could have initiated immediate legal action against Defendant had it believed that Defendant's conduct ran afoul of the core tenets of their agreements.

The Court finds it telling, however, that such action was not instituted until July 30, 2014, nearly six years from the onset of the initial lease. Certainly, in addition to the desire to preserve actions carried out in reasonable reliance upon a promise, an equally important judicial motivation for such doctrines as waiver and estoppel is to discourage litigants from "sleeping on their rights." ²³⁹

*25 Furthermore, the Court finds it quite relevant that Robert Schwoyer was willing to accept variations of the final right-of-way amendment that did not depict the necessary connecting segment of the pipeline, and that Mr. Schwoyer, who visited the construction site on a daily basis, failed to otherwise contest Defendant's right-of-way until now. It is evident that Defendant relied upon these interpretations in constructing its pipeline, and the appropriate remedy now simply as a matter of economics and common sense cannot require such retrograde measures as rerouting of the pipeline or the gas it carries.

It is important to recognize that such determines of waiver and estoppel are necessarily fact-specific ones, but on the basis of the record before the Court, I would hold that at this point, Plaintiff has effectively waived the domestic gas requirement as it pertains to the subsequent right-of-way agreements and is therefore otherwise estopped from asserting a claim on such grounds.

IV. CONCLUSION

Ultimately, this dispute has presented to this Court the opportunity to resolve important issues involving the interpretation of contractual agreements in the natural gas setting, particularly in light the nuanced economic climate of such an industry. For the foregoing reasons, Defendant's Motion for Summary Judgment is granted, and Plaintiff's corresponding Motion for Summary Judgment is denied.

An appropriate Order follows.

All Citations

--- F.Supp.3d ----, 2016 WL 2594186

Footnotes

- 1 Letter, written in collaboration with John Gay, to William Fortescue (Sept. 23, 1725).
- 2 ECF No. 8 at 2.
- Local Rule 56.1 states that the party opposing a motion for summary judgment shall file a separate statement of material facts, responding to the numbered paragraphs set forth in the moving party's statement of material facts and noting genuine issues to be tried. All material facts in the statement of the moving party are admitted unless properly refuted by the opposing party. Id. See also Pinegar v. Shinseki, No. CIV.A.1:07–CV–0313, 2009 WL 1324125, at *1 (M.D.Pa. May 12, 2009) (Conner, J.) ("The purpose of this rule is obvious: it enables the court to identify contested facts expeditiously and prevents factual disputes from becoming obscured by a lengthy record.").
- 4 ECF No. 29 Ex. 8 (2008 Natural Gas Lease).
- 5 ECF No. 29 Ex. 2 (1966 Rutland Deed).
- 6 ECF No. 36 Ex. 10 at 62, 77 (David Schwoyer Dep. 62:11–15, 77:02–15).
- 7 ECF No. 29 at 4 ¶ 16. ECF No. 38 at 3 ¶ 16.
- 8 ECF No. 29 at 4 ¶¶ 16–17. ECF No. 38 at 3 ¶¶ 16–17. ECF No. 36 Ex. 10 at 39 (D. Schwoyer Dep. 39:19–25).
- 9 ECF No. 36 Ex. 10 at 211 (D. Schwoyer Dep. 211:12–16).
- 10 ECF No. 29 Ex. 8 at 2 ¶ 4 ("Royalty Payment").
- 11 ECF No. 29 Ex. 8 at 2 ¶ 1 ("Lease").
- 12 ECF No. 29 at 4 ¶¶ 16–17. ECF No. 38 at 3 ¶¶ 16–17.
- 13 ECF No. 29 at 5 ¶¶ 22–23. ECF No. 38 at 3 ¶¶ 22–23.
- 14 ECF No. 29 at 5 ¶ 27. ECF No. 38 at 4 ¶ 27.
- 15 ECF No. 29 Ex. 8 at 3 ¶ 11 ("Ancillary Rights").
- ECF No. 29 Ex. 8 at 7 ¶ 12 ("Pipelines shall not be constructed on the leased premises except for those used to transport oil and/or gas from a well(s) drilled on leased premises or land pooled therewith."). See also ECF No. 29 at 5 ¶ 27. ECF No. 38 at 4 ¶ 27.

- 17 ECF No. 36 Ex. 10 at 160 (D. Schwoyer Dep. 160:1–3). <u>See also Jacobs v. CNG Transmission Corp.</u>, 332 F.Supp.2d 759, 768 (W.D.Pa.2004).
- 18 ECF No. 29 Ex. 8 at 4 ("SEE ADDENDUM ATTACHED HERETO AND MADE A PART HEREOF").
- 19 ECF No. 29 at 6 ¶¶ 32–33. ECF No. 38 at 6 ¶¶ 32–33.
- 20 ECF No. 29 at 5 ¶ 24. ECF No. 38 at 3 ¶ 24.
- 21 ECF No. 29 Ex. 3 at 3.
- 22 ECF No. 29 at 3 ¶ 12. ECF No. 38 at 2 ¶ 12.
- Though the 2009 right-of-way agreement indicates that the granting party was "Camp Ne'er Too Late," Camp Ne'er Too Late, LP, was not formed until 2010. David Schwoyer, Sr., would later explain in his deposition that the term "Camp Ne'er Too Late" was also used as a locational reference point to describe the lands held by the corporate entity Ne'er Too Late Lodge. ECF No. 36 Ex. 10 at 61:01–13. For the sake of consistency and to remain faithful to the true legal entities, I refer to the granting party by its corporate name, Ne'er Too Late Lodge.
- 24 ECF No. 29 Ex. 10 at 2.
- 25 ECF No. 29 at 7 ¶¶ 36–37. ECF No. 38 at 5 ¶¶ 36–37.
- 26 ECF No. 29 at 7 ¶ 38. ECF No. 38 at 5 ¶ 38.
- 27 ECF No. 29 at 7 ¶¶ 39–40. ECF No. 38 at 5 ¶¶ 39–40.
- 28 ECF No. 36 Ex. 10 at 108 (Schwoyer Dep. 108:7–13).
- 29 ECF No. 29 at 7 ¶ 41. ECF No. 38 at 5 ¶ 41.
- 30 ECF No. 29 at 8 ¶¶ 42–43. ECF No. 38 at 5 ¶¶ 42–43.
- 31 ECF No. 29 Ex. 1. Although Plaintiff has provided the percentage of each shareholder's capital contribution to Lodge, I agree with Defendant that the issue of whether the supplied ownership breakdown of Camp Ne'er Too Late, LP is identical to that of Ne'er Too Late Lodge (and consequently, that of the November 2008 assignment) is unresolved on the present record, as the Court has only been provided with the initial capital contribution breakdown but not with the proportions of ownership as they relate to the rights under the lease. See ECF No. 29 at 3 ¶ 13. ECF No. 38 at 2 ¶ 13. Compare ECF No. 29 Ex. 1 at 23 (listing ownership percentages), with ECF No. 29 Ex. 3 (listing no ownership percentages).
- 32 <u>Id. See also ECF No. 29 Ex. 5.</u> Neither party discusses the potential that the November 2008 transfer, not having been recorded, would have fallen second in priority as to the August 2010 recorded assignment or the result such dynamic would have had upon the standing issue.
- 33 ECF No. 29 Ex. at 5–7.
- 34 ECF No. 38 at 2 ¶ 13.
- 35 <u>Id</u>
- **36** ECF No. 29 at 3 ¶¶ 14–15. ECF No. 38 at 2–3 ¶¶ 14–15.
- 37 ECF No. 29 at 8 ¶ 44. ECF No. 38 at 6 ¶ 44.
- 38 ECF No. 29 at 8 ¶ 48. ECF No. 38 at 6 ¶ 48.
- 39 ECF No. 29 at 8 ¶ 45. ECF No. 38 at 6 ¶ 45. See also ECF No. 29 Ex. 12.
- 40 ECF No. 29 at 9 ¶ 49. ECF No. 38 at 6 ¶ 49.
- 41 ECF No. 29 at 9 ¶ 50. ECF No. 38 at 6 ¶ 50.
- 42 ECF No. 29 at 9 ¶ 52. ECF No. 38 at 6 ¶ 52.
- 43 ECF No. 29 at 9 ¶¶ 53–54. ECF No. 38 at 6 ¶¶ 53–54.
- 44 ECF No. 36 Ex. 10 at 124 (D. Schwoyer Dep. 124:01–05).
- 45 ECF No. 36 Ex. 10 at 125 (D. Schwoyer Dep. 125:04–18).
- 46 ECF No. 36 Ex. 10 at 125–26 (D. Schwoyer Dep. 125:19–126:01).
- 47 ECF No. 36 Ex. 10 at 126 (D. Schwoyer Dep. 126:02–07).
- 48 ECF No. 29 Ex. 14 at 2.
- 49 Id.
- 50 ECF No. 36 Ex. 10 at 132 (D. Schwoyer Dep. 132:09–11).
- 51 ECF No. 36 Ex. 10 at 132 (D. Schwoyer Dep. 132:12).
- 52 ECF No. 29 at 10–11 ¶ 59. ECF No. 38 at 6 ¶ 59. See also ECF No. 29 Ex. 12 at 5 ("Addendum").
- 53 ECF No. 36 Ex. 10 at 132–33 (D. Schwoyer Dep. 132:25–133:04).
- 54 ECF No. 36 Ex. 10 at 119, 127 (D. Schwoyer Dep. 119:01–14, 127:04–09).

- 55 ECF No. 36 Ex. 10 at 114 (D. Schwoyer Dep. 115:22–23).
- 56 ECF No. 29 at 14 ¶ 76. ECF No. 38 at 9 ¶ 76.
- **57** ECF No. 38 at 37–38 ¶ 66.
- 58 ECF No. 38 at 17 ¶ 137.
- 59 ECF No. 38 Ex. 6 at 59 (Schall Dep. 59:04–10).
- 60 ECF No. 38 Ex. 6 at 58 (Schall Dep. 58:20–23).
- 61 ECF No. 29 at 14 ¶ 78. ECF No. 38 at 10 ¶ 78. See also ECF No. 29 Ex. 15 at 2 ("Check No. 502976").
- 62 ECF No. 36 Ex. 10 at 157 (D. Schwoyer Dep. 157:15–18).
- 63 ECF No. 36 Ex. 10 at 157 (D. Schwoyer Dep. 157:19–21).
- 64 ECF No. 36 Ex. 10 at 157, 158 (D. Schwoyer Dep. 157:22–25, 158:10–12).
- 65 See ECF No. 36 Ex. 10 at 142 (D. Schwoyer Dep. 142:19–22).
- 66 See ECF No. 36 Ex. 10 at 143 (D. Schwoyer Dep. 143:15–25).
- 67 See ECF No. 36 Ex. 10 at 143 (D. Schwoyer Dep. 143:06–08).
- 68 See ECF No. 36 Ex. 5 at 7 ¶ 42. ECF No. 40 at 9 ¶ 42.
- 69 See ECF No. 36 Ex. 10 at 143 (D. Schwoyer Dep. 143:11–17).
- 70 ECF No. 29 at 15 ¶¶ 81–82. ECF No. 38 at 10–11 ¶¶ 81–82.
- 71 ECF No. 29 at 15 ¶ 83. ECF No. 38 at 11 ¶ 83.
- 72 ECF No. 29 at 14 ¶ 80.
- 73 ECF No. 29 at 16 ¶ 86. ECF No. 38 at 11 ¶ 86.
- 74 ECF No. 29 at 16 ¶ 88. ECF No. 38 at 11 ¶ 88.
- 75 ECF No. 36 Ex. 10 at 217 (D. Schwoyer Dep. 217:01–05).
- 76 ECF No. 29 at 16 ¶ 88. ECF No. 38 at 11 ¶ 88.
- 77 ECF No. 29 at 17 ¶¶ 97–98. ECF No. 38 at 12 ¶¶ 97–98.
- 78 ECF No. 29 at 16 ¶ 90. ECF No. 38 at 11 ¶ 90.
- 79 ECF No. 38 Ex. 10 at 2 ¶ 4 ("Amendment to Pipeline Right of Way Agreement").
- 80 ECF No. 29 at 16–17 ¶¶ 90, 96. ECF No. 38 at 11–12 ¶¶ 90, 96.
- 81 ECF No. 29 at 17 ¶ 93. ECF No. 38 at 11 ¶ 93.
- 82 ECF No. 38 Ex. 10.
- 83 ECF No. 29 at 18 ¶ 104. ECF No. 38 at 13 ¶ 104.
- 84 ECF No. 29 at 18–19 ¶¶ 103–05. ECF No. 38 at 13 ¶¶ 103–05.
- 85 ECF No. 29 at 19 ¶ 105. ECF No. 38 at 13 ¶ 105.
- 86 ECF No. 29 at 20 ¶ 112. ECF No. 38 at 13 ¶ 112. Plaintiff's answer to Defendant's statement of fact ¶ 112 is non-responsive. Defendant's statement of fact ¶ 112 is therefore deemed as admitted. See also ECF No. 29 Ex. 22 ("Final South"/"Final Property").
- 87 ECF No. 29 at 20 ¶ 113. ECF No. 38 at 13 ¶ 113.
- 88 ECF No. 29 at 20 ¶ 114. ECF No. 38 at 14 ¶ 114.
- 89 ECF No. 29 at 20 ¶ 115. ECF No. 38 at 14 ¶ 115.
- 90 ECF No. 37 at 21.
- 91 ECF No. 29 at 21 ¶ 116. ECF No. 38 at 14 ¶ 116.
- 92 ECF No. 29 at 21 ¶ 117. ECF No. 38 at 14 ¶ 117.
- 93 ECF No. 29 at 21 ¶ 118. ECF No. 38 at 15 ¶ 118.
- 94 ECF No. 29 at 21 ¶ 119. ECF No. 38 at 15 ¶ 119.
- 95 ECF No. 29 at 22 ¶¶ 122–23. ECF No. 38 at 15 ¶¶ 122–23.
- 96 ECF No. 29 at 22 ¶ 124. ECF No. 38 at 15 ¶ 124.
- 97 ECF No. 29 at 22 ¶ 125. ECF No. 38 at 15 ¶ 125.
- 98 ECF No. 29 at 22 ¶¶ 125–27. ECF No. 38 at 15 ¶¶ 125–27.
- 99 ECF No. 38 at 15 ¶¶ 125–26.
- 100 ECF No. 38 at 16 ¶ 129. See also ECF No. 29 Ex. 8 at ¶ 12 ("Shut-in Royalty").
- 101 ECF No. 29 at 23 ¶ 130. ECF No. 38 at 16 ¶ 130.

- 102 ECF No. 29 at 23 ¶ 131. ECF No. 38 at 16 ¶ 131.
- 103 ECF No. 29 at 23 ¶ 132. ECF No. 38 at 16 ¶ 132.
- 104 ECF No. 38 at 16 ¶ 132.
- 105 ECF No. 38 at 16 ¶ 132.
- 106 ECF No. 29 Ex. 24.
- 107 ECF No. 36 Ex. 10 at 215 (Schwoyer Dep. 215:07–14).
- 108 ECF No. 29 Ex. 24 at2.
- 109 <u>Id.</u>
- 110 <u>Id.</u> at 3.
- 111 <u>Id.</u> at 4.
- 112 <u>Id.</u>
- 113 <u>Id.</u>
- 114 <u>Id.</u> at 5.
- 115 <u>Id.</u>
- 116 <u>Id.</u>
- 117 Defendant is a general partner of Shell Energy Holding GP, LLC. ECF No. 9 at 1 ¶ 3.
- 118 ECF No. 1 & Ex. 1.
- 119 Removal was appropriate under 28 U.S.C. § 1441(b), as this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a). Each of Plaintiff's general partners is a citizen of Pennsylvania or Florida. Therefore, Plaintiff is also a citizen of Pennsylvania and Florida. Defendant is a citizen of Delaware and Texas. Plaintiff's Complaint seeks monetary damages "greater than \$50,000.00." ECF No. 9 at 6. Plaintiff also seeks injunctive relief. Id. Making a reasonable, independent valuation of the relief sought, this Court is satisfied that 28 U.S.C. § 1332(a)' s \$75,000.00 statutory minimum amount-in-controversy has been met here. See also ECF No. 1 at 3–4.
- 120 ECF No. 27.
- 121 ECF No. 28.
- 122 ECF Nos. 30–31.
- 123 ECF No. 32 at 5. ECF No. 33.
- 124 ECF No. 32 at 5. ECF No. 33.
- 125 ECF No. 36 (Receipt: Notice of Electronic Filing). Therefore, in addition to the foregoing reasons, Plaintiff's Motion for Summary Judgment could be denied on the independent ground that is was untimely filed. Tardiness has been described as the "quintessential discourtesy." In re Lokuta, 964 A.2d 988, 1005 (Pa.Ct.Jud.Disc.2008). It evidences "disrespect for the judicial system itself" as well as for those who play by the rules. See id.
- 126 Celotex Corp. v. Catrett, 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).
- 127 Fed. R. Civ. P. 56(a).
- 128 <u>Clark v. Modern Grp. Ltd.</u>, 9 F.3d 321, 326 (3d Cir.1993) (Hutchinson, J.) (citing <u>Anderson v. Liberty Lobby, Inc.</u>, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and <u>Celotex Corp.</u>, 477 U.S. at 322, 106 S.Ct. 2548).
- 129 Clark v. Modern Grp. Ltd., 9 F.3d at 326.
- 130 <u>ld.</u>
- 131 <u>Liberty Lobby, Inc.</u>, 477 U.S. at 252, 106 S.Ct. 2505.
- 132 <u>Id.</u>
- 133 <u>Id.</u>
- 134 Id. (quoting Schuylkill & Dauphin Imp. Co. v. Munson, 81 U.S. 442, 447, 14 Wall. 442, 20 L.Ed. 867 (1871)).
- 135 Celotex Corp., 477 U.S. at 323, 106 S.Ct. 2548 (internal quotations omitted).
- 136 <u>Id.</u>
- 137 <u>Liberty Lobby, Inc.</u>, 477 U.S. at 250, 106 S.Ct. 2505.
- 138 Fed. R. Civ. P. 56(c)(1).
- 139 Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co., 311 F.3d 226, 233 (3d Cir.2002) (Weis, J.).
- 140 Fed. R. Civ. P. 56(e)(2).
- **141** Fed. R. Civ. P. 56(c)(3).
- 142 <u>Liberty Lobby, Inc.</u>, 477 U.S. at 249, 106 S.Ct. 2505.

- 143 <u>ld.</u>
- 144 <u>Id.</u> at 249–50, 106 S.Ct. 2505 (internal citations omitted).
- 145 ECF No. 29 at 4 ¶ 16. ECF No. 38 at 3 ¶ 16.
- 146 ECF No. 29 at 3 ¶ 11. ECF No. 38 at 2 ¶ 11.
- 147 ECF No. 29 Ex. 3 at 3.
- 148 ECF No. 29 at 3 ¶ 12. ECF No. 38 at 2 ¶ 12.
- 149 ECF No. 29 Ex. 1. Although Plaintiff has provided the percentage of each shareholder's capital contribution to Ne'er Too Late Lodge, I agree with Defendant that the issue of whether the supplied ownership breakdown of Camp Ne'er Too Late, LP, is identical to that of Ne'er Too Late Lodge (and consequently, that of the November 2008 assignment) is unresolved on the present record. ECF No. 29 Ex. 1 at 23.
- 150 ECF No. 29 at 3 ¶ 13. ECF No. 38 at 2 ¶ 13.
- 151 <u>Id. See also ECF No. 29 Ex. 5.</u> Neither party discusses the potential that the November 2008 transfer, not having been recorded, would have fallen second in priority as to the August 2010 recorded assignment or the result such dynamic would have had upon the standing issue.
- 152 ECF No. 38 at 2 ¶ 13.
- 153 <u>Id.</u>
- 154 ECF No. 29 at 3 ¶¶ 14–15. ECF No. 38 at 2–3 ¶¶ 14–15.
- Plaintiff also contends that the standing dispute could be resolved on a different basis, namely, that the partners of Camp Ne'er Too Late, LP, made initial contributions equivalent to their proportionate stake in the lease. Although Plaintiff has provided the percentage of each shareholder's capital contribution to Lodge, I agree with Defendant that the issue of whether the supplied ownership breakdown of Camp Ne'er Too Late, LP is identical to that of Ne'er Too Late Lodge (and consequently, that of the November 2008 assignment) is unresolved on the present record, as the Court has only been provided with the initial capital contribution breakdown but not with the proportions of ownership as they relate to the rights under the lease. See ECF No. 29 at 3 ¶ 13. ECF No. 38 at 2 ¶ 13. Compare ECF No. 29 Ex. 1 at 23 (listing ownership percentages), with ECF No. 29 Ex. 3 (listing no ownership percentages).
- 156 "A federal court sitting in diversity must apply state substantive law and federal procedural law." Chamberlain v. Giampapa, 210 F.3d 154, 158 (3d Cir.2000) (citing Erie R.R. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (Brandeis, J.)).
- 157 The Pitt News v. Fisher, 215 F.3d 354, 360 (3d Cir.2000) (Nygaard, J.).
- 158 City of Phila. v. Commonwealth, 575 Pa. 542, 559, 838 A.2d 566, 577 (2003).
- 159 <u>City of Phila. v. Schweiker,</u> 579 Pa. 591, 604, 858 A.2d 75, 83 (2004).
- 160 Hosp. & Healthsystem Ass'n of Pa. v. Com., 621 Pa. 260, 279, 77 A.3d 587, 599 (2013) (internal citations omitted).
- 161 <u>Id.</u>
- 162 <u>ld.</u>
- 163 In re Trust Under Deed of Green, 2001 PA Super 186, ¶ 17, 779 A.2d 1152, 1157 (2001) (quoting Ken R. on Behalf of C.R. v. Arthur Z., 546 Pa. 49, 682 A.2d 1267, 1270 (1996)).
- 164 No. CIV. 09–1255(RBK/JS), 2009 WL 1794793, at *3 (D.N.J. June 22, 2009).
- 165 <u>Id.</u>
- 166 <u>Id.</u>
- 167 <u>In re Wheeler's Estate</u>, 287 Pa. 416, 418, 135 A. 252, 252 (1926).
- 168 No. 1:12-CV-01004 RBK/JS, 2012 WL 5868962, at *2 (D.N.J. Nov. 16, 2012).
- 169 See id.
- 170 ld.
- 171 <u>Id.</u>
- 172 ECF No. 29 at 10–11 ¶ 59. ECF No. 38 at 6 ¶ 59. See also ECF No. 29 Ex. 12 at 5 ("Addendum").
- 173 Am. Legacy Found. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania, 640 F.Supp.2d 524, 538 (D.Del.2009), aff'd sub nom Am. Legacy Found., RP v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 623 F.3d 135 (3d Cir.2010).
- 174 See id.
- 175 In re Fed.–Mogul Glob., Inc., 526 B.R. 567, 576 (D.Del.2015).
- 176 <u>Id.</u>
- 177 <u>Id.</u>

- 178 <u>Id.</u>
- 179 <u>Id.</u>
- 180 <u>Id.</u>
- 181 <u>Id.</u>
- 182 Tyco Elecs. Corp. v. Davis, 2006 PA Super 64, ¶ 3, 895 A.2d 638, 640 (2006).
- 183 <u>Id.</u>
- 184 <u>E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.</u>, 269 F.3d 187, 200 (3d Cir.2001) (Barry, J.).
- 185 ECF No. 29 at §§ D–E (discussing the creation of the 2010 and 2011 Right-of-Way Agreements).
- 186 See id.
- 187 ECF No. 29 at 14 ¶ 78, 17 ¶ 98. ECF No. 29 at 10 ¶ 78, 12 ¶ 98.
- 188 ECF No. 39 at 4-5.
- 189 Emerson Radio Corp. v. Orion Sales, Inc., 253 F.3d 159, 164 (3d Cir.2001) (quoting Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co., 180 F.3d 518, 521 (3d Cir.1999)). See also Mylan Inc. v. SmithKline Beecham Corp., 723 F.3d 413, 418 (3d Cir.2013) (Ambro, J.).
- 190 Gen. Refractories Co. v. Fed. Ins. Co., No. CIV.A. 00–5508, 2001 WL 1580173, at *3 (E.D.Pa. Dec. 6, 2001)
- 191 <u>ld.</u>
- 192 LJL Transp., Inc. v. Pilot Air Freight Corp., 599 Pa. 546, 962 A.2d 639, 647 (2009).
- 193 Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 588 Pa. 470, 905 A.2d 462, 469 (2006).
- 194 <u>Id.</u>
- 195 Steuart v. McChesney, 498 Pa. 45, 444 A.2d 659, 661 (1982).
- 196 Franklin Sugar Ref. Co. v. Howell, 274 Pa. 190, 118 A. 109, 110 (1922).
- 197 Steuart, 444 A.2d at 663.
- 198 Roe v. Chief Expl. & Dev. LLC, No. 4:11-CV-00579, 2013 WL 4083326, at *5 (M.D.Pa. Aug. 13, 2013).
- 199 <u>Lenzi v. Hahnemann Univ.</u>, 445 Pa.Super. 187, 195, 664 A.2d 1375, 1379 (1995) (citing <u>Murray v. University of Pennsylvania Hospital</u>, 340 Pa.Super. 401, 490 A.2d 839 (1985)).
- 200 Lenzi, 445 Pa.Super. at 195, 664 A.2d 1375 (citing McGuire v. Schneider, Inc., 368 Pa.Super. 344, 534 A.2d 115 (1987)).
- 201 Lenzi, 445 Pa.Super. at 195, 664 A.2d 1375 (citing McGuire, 368 Pa.Super. at 344, 534 A.2d 115).
- 202 T.W. Phillips Gas & Oil Co. v. Jedlicka, 615 Pa. 199, 208, 42 A.3d 261, 267 (2012) (internal citation omitted).
- 203 <u>Id.</u> (internal quotation marks omitted).
- 204 <u>Benihana of Tokyo, Inc. v. Benihana, Inc.</u>, 59 F.Supp.3d 654, 660 (D.Del.2014), <u>aff'd</u>, 622 Fed.Appx. 169 (3d Cir.2015) (quoting Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569, 750 N.Y.S.2d 565, 780 N.E.2d 166 (2002)).
- 205 <u>Cubbage v. Pittsburg Coal Co.</u>, 216 Pa. 411, 414, 65 A. 797, 798 (1907).
- 206 <u>Id.</u>
- 207 Greek v. Wylie, 266 Pa. 18, 23, 109 A. 529, 530 (1920).
- 208 Capricorn Power Co. v. Siemens Westinghouse Power Corp., 324 F.Supp.2d 731, 751 (W.D.Pa.2004) (Gibson J.).
- 209 Id. at 750-51.
- 210 Id. at 751.
- 211 In re AbitibiBowater Inc., 418 B.R. 815, 824 (Bankr.D.Del.2009).
- 212 2013 PA Super 307, 83 A.3d 177 (2013). See also ECF No. 39 at 8.
- 213 ECF No. 39 at 8.
- 214 Southwestern Energy, 83 A.3d at 181.
- 215 Id. at 187.
- 216 Id. at 188.
- 217 <u>Chesapeake Appalachia, LLC v. Scout Petroleum, LLC</u>, 809 F.3d 746, 761 (3d Cir.2016) (Cowen, J.) (internal quotation marks omitted).
- 218 Shadowbox Pictures, LLC v. Glob. Enterprises, Inc., No. CIV.A. 05–2284, 2006 WL 120030, at *7 (E.D.Pa. Jan. 11, 2006).
- 219 Northrop Grumman Info. Tech., Inc. v. United States, 535 F.3d 1339, 1343 (Fed.Cir.2008).
- 220 Sucesion J. Serralles, Inc. v. United States, 46 Fed.Cl. 773, 785 (2000). Accord Northrop, 535 F.3d at 1344–47; Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 447 (3d Cir.2003).

Camp Ne'er Too Late, LP v. Swepi, LP, --- F.Supp.3d ---- (2016)

2016 WL 2594186

- 221 ECF No. 29 at 10–11 ¶ 59. ECF No. 38 at 6 ¶ 59. See also ECF No. 29 Ex. 12 at 5 ("Addendum").
- 222 ECF No. 38 at 8 ¶ 70.
- 223 Bohler-Uddeholm Am., Inc. v. Ellwood Grp., Inc., 247 F.3d 79, 96 (3d Cir.2001) (Becker, C. J.) (internal quotations omitted).
- 224 <u>Colorcon, Inc. v. Lewis</u>, 792 F.Supp.2d 786, 797 (E.D.Pa.2011) (citing <u>Sun Co. v. Pa. Tpk. Comm'n</u>, 708 A.2d 875, 878–79 (Pa.Commw.Ct.1998)).
- 225 Moore v. CVS Rx Servs., Inc., No. 4:14–CV–01318, 2015 WL 6692266, at *16 (M.D.Pa. Oct. 30, 2015).
- 226 Brown v. City of Pittsburgh, 409 Pa. 357, 360, 186 A.2d 399, 401 (1962) (Eagen, J.) (emphasis in original).
- 227 <u>ld.</u>
- 228 Id.
- 229 Atl. Ref. Co. v. Wyoming Nat. Bank of Wilkes-Barre, 356 Pa. 226, 236-37, 51 A.2d 719, 725 (1947).
- 230 Paramount Aviation Corp. v. Agusta, 178 F.3d 132, 148 (3d Cir.1999) (Becker, C. J.).
- 231 Nw. Nat. Bank v. Commonwealth, 345 Pa. 192, 196, 27 A.2d 20, 23 (1942).
- 232 Zieglar v. Reuss, No. 1588 WDA 2013, 2014 WL 10916932, at *10 (Pa.Super.Ct. June 20, 2014)
- 233 Id.
- 234 Zivari v. Willis, 416 Pa.Super. 432, 434, 611 A.2d 293, 294 (1992).
- 235 Id.
- 236 Id. at 434–35, 611 A.2d 293, 294.
- 237 Id. at 435, 611 A.2d 293, 294.
- 238 Id. at 437, 611 A.2d 293, 294.
- 239 See Upton v. Tribilcock, 91 U.S. 45, 55, 23 L.Ed. 203 (1875) ("Relief is not given to those who sleep on their rights.").

 See also U.S. on Behalf of Small Bus. Admin. v. Richardson, 889 F.2d 37, 40 (3d Cir.1989).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit V

WWW.NYLJ.COM ©2010 ALM

An **ALM** Publication

FRIDAY, DECEMBER 17, 2019

COMMERCIAL DIVISION UPDATE

VOLUME 244—NO. 117

Expert Analysis

Critical Distinctions Between Waiver and Estoppel

recent decision by the Kings County Commercial Division reinforces the venerable New York principle that waiver is a creature of intent, and will not be imposed without a strong showing that the waiving party so intended.¹ In *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, Justice Robert J. Miller rejected an argument that a lender had waived its right to declare a default based upon its alleged oral representations. Because waivers require an unequivocal showing of intent to waive, the borrower's allegations that the lender's representative had "temporarily waived" the right to default failed in the face of a clear "no-oral-modification" clause in the mortgage.

In contrast, the distinct doctrine of estoppel turns upon the detriment suffered by one party stemming from the conduct of another. Waiver and estoppel are often applied by courts in the same breath.² Both doctrines, after all, serve to foreclose the exercise of a party's right based upon the party's words or conduct. Nevertheless, a number of Commercial Division decisions within the last year provide helpful illustrations of the important differences between these two doctrines.

Waiver

"The essence of a waiver is an 'intentional relinquishment of a known right."3 Waiver thus requires a strong and clear showing of intent to waive.⁴ In Brooklyn Fed. Saving Bank, a lender brought an action to foreclose on a mortgage. The parties had agreed in the loan agreement that no waiver of the loan's terms could be made orally. Further, the loan provided that no representative of the lender had the authority to modify orally the terms of the loan.⁵ The borrower, however, alleged that the lender's chief lending officer had orally represented that the lender would delay in declaring a default to allow the borrower to refinance. and that the lender therefore had "temporarily waived" its right to declare a default.⁶ In the face of the clear no-oral-modification provisions, Justice Miller reasoned that the lender could not have intended to waive its rights under the loan through

GEORGE BUNDY SMITH and THOMAS J. HALL are litigation partners with Chadbourne & Parke. Mr. Smith served as an Associate Judge on the New York Court of Appeals from 1992 to 2006. NICOLAS STEBINGER, a litigation associate, assisted with the preparation of this article.





Bundy Smith



And
Thomas J.
Hall

the alleged oral statements of its representative, and thus found that no waiver had occurred.⁷

Just as waiver may not be created by ambiguous statements, it has been held that waiver may not be created by negligence or silence. For example, in *Lafarge Bldg. Materials Inc. v. Pozament Corp.*, a fly ash supplier failed to remit a tipping fee to a cement manufacturer for several months. Writing for the Albany County Commercial Division, Justice Richard M. Platkin rejected the argument that the cement manufacturer's silence regarding the ash supplier's breach constituted a waiver, because silence is insufficient to establish an intent to waive. 9

Practitioners should remain wary of the ways in which estoppel may have implications beyond the express intent of contracting parties.

Estoppel

Estoppel, on the other hand, usually does not require examination of a party's intent. Instead, the equitable doctrine of estoppel looks to whether the party asserting estoppel would otherwise suffer an inequitable detriment based upon the conduct of the other party. ¹⁰ In *Current Med. Directions, LLC v. Salomone*, a former executive claimed that a company had breached its agreement by failing to provide him with audited financial reports. ¹¹ The executive himself, however, had allegedly prevented the company from performing those obligations by refusing to sign off on statements necessary to the audits. The company thus argued that the executive had waived his right to insist on the audited reports. ¹²

Justice Bernard J. Fried of the New York County Commercial Division rejected the company's

waiver argument, holding that "[w]aiver is an 'intentional abandonment or relinquishment of a known right' and...[t]he record in this case does not reflect that [the executive] intentionally relinquished or abandoned his rights" to the reports. Justice Fried continued, however, that "in light of his subsequent conduct...[the executive] should be equitably estopped" from arguing that the company had breached its agreement by failing to provide the required reports—to allow such an argument would inequitably penalize the company for the former executive's own misdeeds.¹⁴

Estoppel may also be premised upon a detrimental change in position in reliance upon the conduct of the party to be estopped. ¹⁵ That reliance, however, must be justified. In *Najung Seung v. Fortune Cookie Projects*, an art buyer allegedly relied upon the representations of an art dealer that a painting was worth as much as \$500,000, and purchased the painting without independently verifying its value.

The buyer later discovered, however, that the painting was worth barely a fifth of what the dealer had suggested. Because the art buyer purchased the painting from the dealer in an arm's-length transaction, in the absence of any special relationship of trust, Justice Eileen Bransten of the New York County Commercial Division found that the buyer's reliance on the dealer's representations was not justified, and rejected his claim of estoppel. 17

Clauses

One context in which the difference between the doctrines of estoppel and waiver can be outcomedeterminative relates to contracts containing nooral-modification clauses. In a no-oral-modification clause, the contracting parties agree in writing that any rights under their contract may be altered only by signed writings.

No-oral-modification clauses are a clear, considered expression of intent to restrict the means of amending an agreement, and as demonstrated in *Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realty LLC*, a subsequent oral statement generally will be insufficient to create a waiver. ¹⁸ Estoppel, however, may provide a means for one party to enforce a subsequent oral promise against another, despite the presence of a no-oral-modification provision.

A contract may be orally modified despite a no-oral-modification clause if one party to a contract has partially performed and can demonstrate New York Law Tournal FRIDAY, DECEMBER 17, 2070

equitable estoppel. The case of Ramlall v. Choice Money Transfer Inc., before Justice Timothy S. Driscoll of the Nassau County Commercial Division, involved an alleged breach of an employment contract.¹⁹ A former employee alleged that an executive of his former employer company orally promised him a new position in India, but that he was fired upon moving to India. The employee claimed that the company had breached its contract, based upon the alleged oral promises. The company responded that the employment contract at issue contained a no-oral-modification provision, and thus alleged oral promises should have no effect.²⁰

Justice Driscoll relied upon B. Reitman Blacktop Inc. v. Missirlian for the principle that an oral modification may be enforceable, despite the presence of a no-oral-modification clause, if there is "part performance that is 'unequivocally referable to the oral modification," and the party seeking enforcement makes a showing of equitable estoppel.²¹ Justice Driscoll held that, if the facts were true as alleged by the former employee and he had indeed moved to India in reliance upon the executive's promises, the employee could succeed in showing an enforceable oral modification and a resulting breach of contract.²² Justice Driscoll therefore rejected the company's motion to dismiss.23

The doctrine of estoppel usually does not require the court to ignore all prior indications of the parties' intent, however. A party claiming estoppel based on detrimental reliance upon the conduct of another must show that its reliance was justified.24 Therefore, if a contractual provision renders reliance upon subsequent oral representations unreasonable, it can still provide a defense against their enforcement. For example, a contractual merger clause may preclude justifiable reliance on representations extrinsic to the contract.

In Telcar Group, Ltd. v. Telcar Certified Ltd., the former owners of various assets sued the acquirers, claiming that the acquirers had converted receivables, in addition to the assets rightfully acquired.²⁵ The acquirers responded that the former owners had represented that the disputed receivables would be included among the assets transferred according to an asset purchase agreement. The asset purchase agreement, however, contained a merger clause in which the parties stipulated that they did not rely upon any extrinsic representations in reaching the agreement.²⁶

Writing for the Commercial Division of Suffolk County, Justice Emily Pines found that in the face of the merger clause, any reliance by the acquirers on extrinsic representations would thus be unreasonable, and could not support a finding of estoppel.²⁷

Similarly, an unconditional guaranty may preclude a guarantor from arguing estoppel based on reliance upon oral modifications to the loan agreement. In Anglo Irish Bank Corp. v. Ashkenazy, guarantors contesting the enforcement of a loan agreement asserted the defense of estoppel, arguing that the lender should be bound by its alleged oral promises to extend loan structuring options in addition to the commitments in their written contract.²⁸ The guaranty, however, was "absolute and unconditional," and the guarantors explicitly waived any defenses to the enforceability of the loan terms.29

Because the guarantors themselves had disclaimed any intent to contest the enforceability of the loan documents, Justice Fried of the New York County Commercial Division rejected the argument that the guarantors were entitled to rely upon the lender's alleged oral promises to restructure the loan.³⁰ In the absence of justifiable reliance, the guarantors' claims of estoppel were doomed to failure.31

Extending Obligations

Whereas waivers are usually narrowly construed according to the clear expressions of intent that support them, the doctrine of estoppel has been used to create obligations as justice requires, even going so far as to extend contractual obligations beyond the parties to a contract. In Merrill Lynch Int'l Fin. Inc. v. Donaldson, a company's affiliate gave loans on advantageous terms to the company's employees.³² The company's standard employment agreement contained an arbitration clause. The affiliate lender brought a lawsuit seeking repayment of a loan to an employee of the company. The employee, however, moved to compel arbitration with the lender, despite the absence of an arbitration clause between the two parties.33

No-oral-modification clauses are a clear, considered expression of intent to restrict the means of amending an agreement. A contract, however, may be orally modified despite a no-oralmodification clause if one party to a contract has partially performed and can demonstrate equitable estoppel.

Justice James A. Yates of the Commercial Division of New York County relied upon the principle that estoppel can require the enforcement of an arbitration clause as to a third party when the third party acts in concert with a party to the contract with an arbitration clause, and held that arbitration should be compelled.³⁴ Though the company had not intended to subject its affiliate to the arbitration clause of its employment contracts, equity would not permit the company to escape the arbitration clause merely by using its affiliate as a financing arm; the affiliate was thus estopped from avoiding arbitration.³⁵

Conclusion

Although waiver and estoppel are often applied in tandem, this group of recent Commercial Division cases highlights the key distinctions between the two doctrines. Waiver and estoppel will in many cases lead to the same outcome, but practitioners should remain wary of the ways in which estoppel may have implications beyond the express intent of contracting parties. Moreover, while oral waivers frequently will not survive the existence of a no-oral-modification clause, claims of estoppel have been found to circumvent such clauses.

1. Brooklyn Fed. Saving Bank v. 9096 Meserole St. Realt LLC, NYLJ, Nov. 22, 2010, No. 3012/10, 2010 N.Y. Misc. LEXIS 5450 (Kings Co. Nov. 5, 2010) (Miller, J.).

2. See, e.g., Gilbert Frank Corp. v. Fed. Ins. Co., 70 N. 966, 968 (1988) ("Waiver is an intentional relinquishment") a known right and should not be lightly presumed... Nor the facts show that defendant, by its conduct, otherwise luled plaintiff into sleeping on its rights...[in support of a claim of estoppel].") (citations omitted).

3. Orange Steel Erectors Inc. v. Newburgh Steel Prods.

225 A.D.2d 1010, 1012 (3d Dept. 1996). 4. Gilbert Frank Corp., 70 N.Y.2d at 968

5. Brooklyn Fed. Saving Bank, 2010 N.Y. Misc. LEXIS 5450

6. Id. at *6-7.

7. Id. at *10.

8. Lafarge Bldg Materials Inc. v. Pozament Corp., No. 3833-04, 2010 N.Y. Misc. LEXIS 4138, at *2-3 (Albany Co. Aug. 2010) (Platkin, J.).

10.FirstAm. TitleIns. Co. of N. Y. v. Rubal, No. 018349-06, 2010 Misc. LEXIS 1196, at *15 (Nassau Co. Jan. 22, 2010) (Driscoll 11. Current Med. Directions, LLC v. Salomone, No. 600941 (DR)

2010 N.Y. Misc. LEXIS 388, at *2 (N.Y. Co. Feb. 2, 2010) (Fried

12. Id. at *7-10.

13. Id. at *8. 14. Id. at *8-9

15. Najung Seung v. Fortune Cookie Projects, No. 600537/09, 2010 N.Y. Misc. LEXIS 3991, at *5 (N.Y. Co. Aug. 9, 2010) (B)

16. Id. at *3

17. Id. at *5.

18. Brooklyn Fed. Saving Bank, 2010 N.Y. Misc. LEXIS 5450, at *9-10.

19. Ramlall v. Choice Money Transfer Inc., No. 021683-07, 2010 N.Y. Misc. LEXIS 2280 (Nassau Co. June 11, 2010) (Driscoll, J.). 20. Id. at *22, 29.

21. Id. at *27 (quoting B. Reitman Blacktop Inc. v. Missirlian, 52 A.D.3d 752, 753 (2d Dept. 2008)).

22. Ramlall, 2010 N.Y. Misc. LEXIS 2280, at *29.

23. Id.

24. See Rubal, 2010 N.Y. Misc. LEXIS 1196, at *15.

25. Telcar Group, Ltd. v. Telcar Certified Ltd., No. 27352-2004, 2009 N.Y. Misc. LEXIS 2870, at *2 (Suffolk Co. Sept. 14, 2009) (Pines, J.).

26. Id.

27. Id. at *6.

28. Anglo Irish Bank Corp. v. Ashkenazy, No. 103006/10, 2010 N.Y. Misc. LEXIS 3784, at *6 (N.Y. Co. Aug. 4, 2010) (Fried, J.).

29. Id at *10-11. 30 Id

31. Id.

32. Merrill Lynch Int'l Fin. Inc. v. Donaldson, 895 N.Y.S.2d 698, 701, 27 Misc.3d 391, 393-94 (N.Y. Co. 2010) (Yates, J.).

34. Id. at 703, 27 Misc.3d at 396-97.

35. Id.

Reprinted with permission from the September 22, 2010 edition of the NEW YORK LAW JOURNAL © 2010. ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382 or reprints@alm. com.#070-09-10-37

Exhibit U

2008 WL 5156437 Only the Westlaw citation is currently available. United States District Court, D. Colorado.

WEST RIDGE GROUP, L.L.C., and Does 1–100, Plaintiff,

v.

FIRST TRUST COMPANY OF ONAGA, Roger Crouch, Morrill and Janes Bank and Trust, Neill H. Taylor, and Roes 2–100, Defendants.

Civil Action No. 07-cv-01587-WYD-BNB.

Attorneys and Law Firms

2008 WL 5156437

Phillip E. Anselmo, Attorney at Law, Montrose, CO, for Plaintiff.

Sean Gardner Saxon, Sean D. Baker, Wheeler Trigg Kennedy, LLP, Denver, CO, Thomas Carl Hill, Hill, Kinney & Wood, L.L.C., Carbondale, CO, for Defendants.

ORDER

BOYD N. BOLAND, United States Magistrate Judge.

- *1 This matter arises on the following:
- (1) Defendants First Trust Company of Onaga and Morrill and Janes Bank and Trust's Motion to Strike Plaintiff's Untimely Notice of Demand for Rule 38 Jury Trial [Doc. # 159, filed 7/28/2008] (the "Motion to Strike Jury Demand"); and
- (2) **Plaintiff's Motion for Trial By Jury** [Doc. # 164, filed 7/30/2008] (the "Motion for Jury Trial").
- (3) The Motion to Strike Jury Demand is GRANTED, and the Motion for Jury Trial is DENIED.

I.

This action was commenced by the filing of a Complaint [Doc. # 1–2] in the District Court of Delta County. Colorado, on May 18, 2007. The Complaint asserts claims for (1) breach of contract; (2) an accounting; (3) unjust enrichment; (4) interference with business relations; (5) unfair trade practices; (6) violation of the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. §§ 2601–2617, and other unspecified statutes; and (7) negligence. The action was removed to this court by a Notice of Removal [Doc. # 1] on July 26, 2007. Prior to removal, defendant Neill H. Taylor answered and filed a counterclaim for abuse of process. [Doc. # 1-13.] After removal, defendant Roger Crouch answered and also filed a counterclaim for abuse of process. [Doc. # 21, filed 8/28/2008.] Defendants First Trust Company of Onaga ("First Trust") and Morrill and Janes Bank and Trust ("M & J Bank") answered. [Doc. # 39, filed 9/18/2007.]

II.

Rule 81(c), Fed.R.Civ.P., addresses the issue of what rules apply to actions removed from state to federal court. The rule provides, in pertinent part:

- (c) Removed Actions.
- (1) Applicability. These rules apply to a civil action after it is removed from a state court.

* * *

- (3) Demand for a Jury Trial.
- (A) As Affected by State Law. A party who, before removal, expressly demanded a jury trial in accordance with state law need not renew the demand after removal. If the state law did not require an express demand for a jury trial, a party need not make one after removal unless the court orders the parties to do so within a specified time. The court must so order at a party's request and may so order on its own. A party who fails to make a demand when so ordered waives a jury trial.

No jury demand was made by any party before removal, so the first sentence of Fed.R.Civ.P. 81(c)(3)(A) does not apply. Colorado state law does require an express demand for a jury trial, see Colo. R. Civ. P. 38, so the remaining three sentences of Fed.R.Civ.P. 81(c)(3)(A) also are inapplicable. Under these circumstances, Fed.R.Civ.P.

81(c)(1) controls and requires that after removal the applicable federal rule concerning a jury demand will apply. The applicable federal rule, Fed.R.Civ.P. 38, provides in relevant part:

Right to a Jury Trial; Demand

- (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution—or as provided by a federal statute—is preserved to the parties inviolate.
- *2 (b) Demand. On any issue triable by a jury, a party may demand a jury by:
- (1) serving the other parties with a written demand—which may be included in a pleading—no later than 10 days after the last pleading directed to the issue is served; and
- (2) filing the demand in accordance with Rule 5(d).

* * *

(d) Waiver; Withdrawal. A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.

No jury demand was filed in this case until July 13, 2008, nearly ten months after the last pleading, when the plaintiff filed its "Notice of Plaintiff's Demand for Rule 38 Jury Trial (etc.)" [Doc. # 149] (the "Jury Demand"). Two weeks later, the plaintiff filed its Motion for Jury Trial. The Jury Demand and the Motion for Jury Trial are untimely under Rule 38 by months.

The Tenth Circuit Court of Appeals has addressed the issue of a late jury demand in *FDIC v. Palermo*, 815 F.2d 1329 (10th Cir.1987):

Under Fed.R.Civ.P. 38(d), failure to so demand [under Rule 38(b)] constitutes a waiver of trial by jury, but a trial court retains discretion upon motion under Fed.R.Civ.P. 39(b) to order a jury trial when one was not properly demanded under Rule 38.

Although Rule 39 provides for the court's discretion to be invoked by motion, some similar manifestation of the desire of a party to have a jury trial will suffice. When the request for a jury trial is made in a manner sufficient to bring it to the attention of the court and the

other parties, as it was here in a pretrial memorandum many months before the trial, the failure to file the request as a "motion" should not be deemed fatal.

Id. at 1333–34 (internal citations omitted). ² In Swofford v. B & W, Inc., 336 F.2d 406, 409 (5th Cir.1964), a decision upon which the Tenth Circuit has relied, the court held that a late-filed jury demand, rather than a motion, is sufficient to allow the trial court to exercise its discretion under Rule 39(b).

The circuit court has consistently held that district courts should exercise their discretion to grant motions for jury trials under Rule 39(b) absent strong and compelling reasons to the contrary. *Green Construction Co. v. Kansas Power & Light Co.*, 1 F.3d 1005, 1011 (10th Cir.1993); *Nissan Motor Corp. in USA v. Burciaga*, 982 F.2d 408, 409 (10th Cir.1992); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir.1965). The circuit court has also held, however, that "the district court does not abuse its discretion by denying a Rule 39(b) motion when the failure to make a timely jury demand results from nothing more than the mere inadvertence of the moving party." *Dill v. City of Edmond*, 155 F.3d 1193, 1208 (10th Cir.1998)(internal quotations and citations omitted).

In this case, a strong and compelling reason exists to deny the late jury request. In particular, very early in the case the plaintiff consented in the Scheduling Order to a "3–5 day bench trial," which was made an order of the court. See Scheduling Order [Doc. # 50, filed 10/11/2007] p. 16 at Part 10(b) (emphasis added). Several courts, on similar facts, have held that such an express and intentional waiver of the right to a jury trial cannot subsequently be overridden by a late jury demand. For example, in Power v. Tyco Int'l (US), Inc., 2006 WL 1628588 (S.D.N.Y.2006), the court refused to grant a late jury demand, noting:

*3 The parties' formal proposal to the Court, and the Court's acceptance, of a [case management plan] providing for a non-jury trial constitutes an express waiver of a jury trial. The very purpose of including such a term in the Court's standard form CMP is to eliminate later litigation about trial issues by either securing the parties' agreement about how a case is to be tried or at least surfacing disagreement at an early stage of the case.

* * :

[P]laintiff and defendant here have been under the impression that the case would be tried *without* a jury since the parties' agreement to the CMP in August 2005. Tyco did not simply fail to observe a procedural formality.... Quite to the contrary, Tyco affirmatively agreed that the case would not be tried to a jury.

2008 WL 5156437

2005. Tyco did not simply fail to observe a procedural formality.... Quite to the contrary, Tyco affirmatively agreed that the case would not be tried to a jury. Tyco has not demonstrated a reason better than "mere inadvertence" for its failure to insist on a jury trial. On the contrary, Tyco made a deliberate decision to agree to a bench trial....

Id. at *3–4. Here, as in the *Tyco* case, the plaintiff's waiver in the Scheduling Order "was knowing and voluntary in any normal sense of the words." *Id.* at *3. Now, after consenting to a bench trial, the plaintiff's strategy apparently has changed, and it has filed its belated jury demand. As in *Tyco*, however, a change in strategy cannot constitute the basis for an untimely jury demand. *Id.* at *4.

Similarly, in *Paulissen v. United States Life Ins. Co.*, 205 F.Supp.2d 1120 (C.D.Calif.2002), the court rejected the plaintiff's late jury demand under Rule 39(b), finding that "[p]laintiff waived her right to a jury trial both by not making a timely demand and explicitly, through her counsel, at the October 29, 2001, Scheduling Conference." *Id.* at 1125. The court held:

When a party intentionally waives her right to a jury trial, she cannot meet the burden of demonstrating something beyond mere inadvertence of counsel.... Because [p]laintiff intentionally and explicitly waived her right to a jury trial, the Court declines to exercise its discretion under Rule 39(b) to order a trial by jury.

Id. See also Oklahoma Natural Gas Co. v. Larue, 1998 WL 568321 *7 (10th Cir. Sept.1, 1998)(unpublished)(holding that the trial court did not abuse its discretion in denying a motion for jury under Rule 39(b) where there were repeated indications in the parties' joint status report and the scheduling order that the case was set for a "non-jury trial").

Similarly in this case the plaintiff's late jury demand follows an intentional and knowing waiver of its right to a jury in the Scheduling Order and is based on an apparent change of strategy, which is even less justification than mere inadvertence. Under these facts, denial of the late demand is appropriate under *Nissan Motor Corp.*, 982 F.2d at 409.

IV.

Even in the absence of the express waiver contained in the Scheduling Order, the late jury demand should be rejected. Plaintiff's counsel attempts to justify his client's late demand because "[p]laintiff's counsel has not practiced in Federal Court in over ten years"; he is "a sole practitioner" and "not adept at Federal Procedure"; this case is the first where he has had to utilize the court's electronic filing procedure; "[p]laintiff's counsel is unfamiliar with the new Federal Rules"; defendants engaged in forum shopping when they removed the case to this court; the defendants are not prejudiced by the late demand because "the parties are still in the discovery stage of litigation"; "[p]laintiff's counsel was under the good faith impression that jury trial's [sic] were guaranteed under the Constitution (which they are) unless affirmatively waived"; and the issues in the case "are traditionally jury issues." Motion for Jury Trial at p. 2. Most of the excuses amount to inadvertence. In addition, counsel's lack of familiarity with the court's electronic filing system is irrelevant; there was no improper forum shopping by the defendants, as the court's denial of the motion to remand establishes; the argument that discovery was ongoing at the time of the late jury demand is disingenuous because discovery ended approximately two weeks after the plaintiff's late Jury Demand [Doc. # 149, filed 7/13/2008] was filed, and two days after the Motion for Jury Trial [Doc. # 164, filed 7/30/2008], see Order [Doc. # 119, filed 5/19/2008](setting a discovery cut-off of August 1, 2008); and, as discussed earlier, the plaintiff did affirmatively waive its right to a jury in the Scheduling Order.

- *4 Some courts have identified a five factor test to be applied in connection with exercising the discretion conferred under Rule 39(b), including:
 - (1) whether the case involves issues which are best tried to a jury;
 - (2) whether granting the motion would result in a disruption of the court's schedule or that of the adverse party; (3) the degree of prejudice to the adverse party; (4) the length of the delay in having requested a jury

trial; and (5) the reason for the movant's tardiness in requesting a jury trial.

Parrott v. Wilson, 707 F.2d 1262, 1267 (11th Cir.1983); see Daniel Int'l Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1064 (5th Cir.1990)(same). Application of these factors here dictates that the late jury demand must be denied.

First, although some of the plaintiff's claims are triable to a jury (*e.g.*, breach of contract and negligence), others are not (*e.g.*, the request for an accounting and the claim for unjust enrichment). This factor is neutral.

Second, allowing the late demand and trying the case to a jury would not disrupt any schedule. This factor points in favor of allowing the late jury demand.

The defendants, however, have established that they would be prejudiced by allowing a late demand because they would have prepared the case differently had expected the case to be tried to a jury. For example, defendants Crouch and Taylor state that they might have engaged additional experts and endorsed additional witnesses. This third factor points against allowing the late jury demand.

The fourth and fifth factors point strongly against allowing the late jury demand, however, and in my opinion are determinative of the matter. The plaintiff waited more than ten months before making the late jury demand, after expressly stating in the Scheduling Order that the matter would be tried to the court, and made its demand at the close of discovery. The reason for its tardiness in making the jury demand was a change of strategy. In my view, the defendants were actively misled throughout the pretrial proceedings into believing that the case would be tried to the court, and the demand came only as the matter was nearing the pretrial conference stage. It would be fundamentally unfair to reward this strategy of misdirection by allowing a late jury demand.

V.

Finally, the plaintiff makes the following cryptic argument:

Here, there are extant several pleadings motions. If, e.g., the

Court were to deny [p]laintiff's motion to dismiss the [d]efendant's counterclaim, an answer would be required. Plaintiff would then have an additional ten days after the answer date to file a jury demand.

Motion for Jury Trial at p. 3. Unfortunately, the plaintiff does not identify with specificity the "several pleadings motions" to which it refers.

This case has involved a number of procedural irregularities, due in part to the failure of plaintiff's counsel to comply with the Federal Rules of Civil Procedure, the local rules of practice, and the practice standards of the district judge. In particular, the plaintiff has filed five motions directed at the counterclaims asserted against it by Crouch and Taylor. The first, filed in a format used in the state court but not by this court, was captioned "Motion to Dismiss to Neill H. Taylor Civil Counter Complaint (Revised)" [Doc. # 13, filed 8/8/2007] (the "First Taylor Motion"). That motion was filed after the case was removed to this court, and states in its opening sentence:

*5 PLAINTIFF West Ridge Group L.L.C. does hereby MOVE TO DISMISS/DEMURRER to Neill H. Taylor's counter complaint and moves now for an order of dismissal under C.R.C.P. 12(b)(5) which is considered as a Rule 56 motion FOR FAILURE TO STATE A CLAIM UPON WHICH RELIED CAN BE GRANTED.

First Taylor Motion at p. 1.

The First Taylor Motion has never been ruled on, and apparently was superseded by the plaintiff's "Demurrer (Answer) to Neill H. Taylor Civil Counter Complaint" [Doc. # 24, filed 9/3/2008] (the "Second Taylor Motion"). The Second Taylor Motion, which again utilized the state court format, was stricken by the district judge for failure to comply with his practice standards, noting that "[t]his pleading appears to include either a motion to dismiss or a motion for summary judgment, however, it is not clear based on the language of the pleading." Minute Order [Doc. # 38, filed 9/17/2007].

The plaintiff then filed a document captioned "(amended) Motion to Dismiss Crouch and Taylor Counter Complaint" [Doc. # 43, filed 9/25/2007] (the "First Joint Motion"). The First Joint Motion was stricken by the district judge for failure to comply with his practice standards and because the pleading appeared to be incomplete and to require the attachment of exhibits. Minute Order [Doc. # 45, filed 9/26/2007].

Next, the plaintiff filed a document captioned "Notice of Motion for Summary Judgment of Taylor and Crouch Counter Complaint" [Doc. # 52, filed 10/13/2007] (the "Second Joint Motion"). The Second Joint Motion was stricken by the district judge, again for failure to comply with his practice standards. Minute Order [Doc. # 54, filed 10/15/2007].

Finally, the plaintiff filed its "Notice of Motion for Summary Judgment of Taylor and Crouch Counter Complaint" [Doc. # 55, filed 10/15/2007] (the "Third Joint Motion"). The Third Joint Motion was denied without prejudice when the district judge administratively closed the case, Minute Order [Doc. # 83, filed 3/5/2008], and was never renewed.

Significantly, the plaintiff never answered the counterclaims, ³ and defendants Crouch and Taylor never moved for the entry of default. The parties apparently have treated the plaintiff's various motions as a general denial of the allegations of the counterclaims. I deem the allegations of those counterclaims as denied and will not require the filing of any further answer.

Contrary to the plaintiff's assertion, there are no motions to dismiss pending which would allow further pleadings by the plaintiff. Even if there were, the plaintiff would be allowed to demand a jury only as to the matters raised in Crouch and Taylor's counterclaims, and not with respect to the plaintiff's claims. See Fed.R.Civ.P. 38(b)(1) (stating that a demand may be filed "no later than 10 days after the last pleading directed to the issue is served" (emphasis added)); Nissan Motor Corp., 982 F.2d at 409 (holding that the filing of an amended complaint does not create a new right to demand a jury if the amendment "merely raise[s] new theories of recovery based on the same facts as those issues raised in the original complaint"); see also Oklahoma Natural Gas, 1998 WL 568321 at *6-7 (unpublished) (holding that "Rule 38 applies to 'issues' not cases," and indicating that a jury demand filed 10 days after a pleading by the intervenors would allow a jury only with respect to the issues and the parties "implicated by the pleading[]").

VI.

*6 IT IS ORDERED that the Motion to Strike Jury Demand [Doc. # 159] is GRANTED.

IT IS FURTHER ORDERED that the Motion for Jury Trial [Doc. # 164] is DENIED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5156437

Footnotes

- The plaintiff filed a motion to remand the case [Doc. # 8, filed August 1, 2008], which was denied. See Order [Doc. # 63, filed 10/31/2007].
- 2 Rule 39(b), Fed.R.Civ.P., states:
 - Issues on which a jury trial is not properly demanded are to be tried by the court. But the court may, on motion, order a jury trial on any issue for which a jury might have been demanded.
- Rule 7(a), Fed.R.Civ.P., provides that the pleadings in a case may include a complaint; answer to the complaint; answer to a counterclaim; answer to a crossclaim; third party complaint; answer to a third-party complaint; and reply to an answer "if the court orders one."
- 4 Rule 12(a)(4), Fed.R.Civ.P., requires a party to file an answer to a counterclaim "within 10 days after notice of the court's action" denying or postponing the disposition of a motion to dismiss.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit X

2006 WL 1628588

Only the Westlaw citation is currently available.

United States District Court,

S.D. New York.

Richard D. POWER, Plaintiff,
v.
TYCO INTERNATIONAL (US), INC., Defendant.

No. 02 Civ. 6444(GEL).

|
June 13, 2006.

Attorneys and Law Firms

Kenneth J. Rubenstein, Olshan Grundman Frome Rosenzweig & Wolosky LLP, New York, NY, for Plaintiff.

Rene M. Johnson, Morgan, Lewis & Bockius LLP, New York, NY, for Defendant.

OPINION AND ORDER

GERARD E. LYNCH, District Judge.

*1 In this action for damages arising out of an alleged breach of contract, defendant Tyco International (US), Inc. ("Tyco") moves pursuant to Fed.R.Civ.P. 39(b) for an order that the case is to be tried by jury, notwithstanding its prior waiver of a jury trial. The motion will be denied.

BACKGROUND

Plaintiff Richard D. Power brought this action on August 14, 2002, claiming defendant breached an agreement relating to Power's bonus compensation and severance package. On September 5, 2002, Tyco apparently served and attempted to file a demand for a jury trial. (Johnson Decl. Ex. D.) The demand, however, was never entered on the Court's docket. On October 8, 2002, following a conference with counsel, the Court entered a case management plan ("CMP") specifying, among other things, that the case was to be tried by jury. Shortly thereafter, Tyco replaced its counsel and retained its present lawyers.

In December 2002, however, proceedings in this case were stayed on motion of the District Attorney of New York County, pending the resolution of criminal proceedings against L. Dennis Kozlowski and Mark Swartz, respectively Tyco's former CEO and CFO. The case remained dormant until June 2005, following the convictions of Kozlowski and Swartz.

On August 8, 2005, following the lifting of the stay, the Court entered a revised CMP, as jointly proposed by the parties. This CMP, however, specified that the case was *not* to be tried by jury.

Tyco asserts, without contradiction, that the proposed CMP was initially drafted by plaintiff's counsel. However, the proposal was not slipped past unsuspecting attorneys for Tyco. Plaintiff's attorney specifically asked Tyco's counsel whether Tyco had demanded a jury trial. Upon reviewing the docket and finding that it reflected no jury demand, Tyco's attorneys concluded that prior counsel had failed to demand a jury, and thereby had waived its right to a jury trial. Evidently, counsel either did not notice or did not consider the effect of the October 2002 CMP, and its provision for a jury trial, which was specifically noted on the docket. Nor did Tyco move at that time pursuant to Rule 39(b) for relief from what it believed to have been a waiver. Instead, Tyco simply agreed to submit to the Court a proposed order, which the Court adopted, calling for a bench trial.

Some six months later, Tyco's attorneys discovered the undocketed jury trial demand. Tyco indicated to plaintiff its belief that this newly uncovered demand required that the case be tried by jury; plaintiff disagreed. The parties then submitted to the Court by letter a dispute about the proper interpretation of these events.

On March 22, 2006, this Court entered an order ruling that the August 2005 CMP "controls this litigation" and that by agreeing to the CMP, which states that this case is not to be tried by a jury, Tyco waived its right to a jury trial. The Court reasoned that:

The issue here ... is not whether the September 5, 2002, jury demand was effective when it was initially filed, but rather whether Tyco's subsequent stipulation in the CMP that this case *is not* to be tried by a jury properly withdrew that demand. Fed.R.Civ.P. 39(a) states that if a party demands a jury trial, the trial "shall be by

jury, unless ... the parties or their attorneys of record, by written stipulation filed with the court ..., consent to trial by the court sitting without a jury." Tyco claims that it "has never expressly withdrawn its demand for a jury trial, nor stipulated to a waiver," because until recently Tyco was not aware that it *had* previously filed a jury demand. Tyco admits that it consented to the CMP, which states that this case will be tried by the Court. However, Tyco claims that its consent was not "knowing[] or voluntar[y]" because it was "based on its counsel's mistaken belief-based on both parties' review of the docket-that Tyco's previous counsel had not filed a jury demand." Tyco asserts that if the docket had reflected the prior jury demand, it would not have consented to the CMP.

*2 ... Tyco consented to the CMP, including the provision that the case is not to be tried by a jury, and that consent is not defective simply because Tyco mistakenly believed that no prior jury demand had been filed. If Tyco did not want to consent to a bench trial in the CMP, it could have moved for a jury trial pursuant to Fed.R.Civ.P. 39(b), which gives the Court discretion to order a trial by jury even when a proper demand has not been filed. Alternatively, Tyco could have attempted to hold plaintiff to the terms of the initial CMP, dated October 8, 2002, which was properly docketed and stated that the case was to be tried by a jury. However, Tyco did neither of these things. Instead, Tyco consented to trial by the Court sitting without a jury, and under Fed.R.Civ.P. 39(a), that consent, together with plaintiff's consent, trumps any prior jury demand.

(Order of Mar. 22, 2006, at 1-2.)

However, the Court expressly noted that the question then before it simply concerned "the current operative order with respect to a jury trial in this matter," and therefore declined to address what showing would be necessary for defendant to withdraw its jury trial waiver embodied in the August 2005 CMP, or whether defendant had made such a showing. Tyco, interpreting the Court's reticence as "a recommendation to file a motion to alter the provision in the [CMP] relating to whether this case is to be tried by a jury" (Def.Mem.3), now moves pursuant to Fed.R.Civ.P. 39(b) for a determination that this case is to be tried by jury.

DISCUSSION

Rule 39(b) grants discretion to district courts to order a jury trial, even where a party failed to demand one,² but the rule itself provides no guidance concerning how to exercise that discretion. The majority rule is one of deference to the judgment of the district courts, with the First Circuit stating that "the case would be very rare indeed where a district court abused its discretion in denying or granting a Rule 39(b) motion." Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194, 200 (1st Cir.1987). Other courts of appeals have hinted at the factors to be weighed by a district court deciding a motion under Rule 39(b). As Justice Scalia has explained, "Over the years, appellate courts have consistently upheld the trial judges in allowing or refusing late demanded jury trials, but in doing so have laid down two guidelines for exercise of the discretionary power. The products of cumulative experience, these guidelines relate to the justifiability of the tardy litigant's delay and the absence of prejudice to his adversary." Pierce v. Underwood, 487 U.S. 552, 562 (1988), quoting Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L.Rev. 635, 662-63 (1971).

Despite this prevailing liberality, our Court of Appeals has held that "mere inadvertence of counsel [is] not an adequate basis for allowing an untimely filing of a jury trial notice," *Cascone v. Ortho Pharm Corp.*, 702 F.2d 389, 390 (2d Cir.1983), and has therefore "shrunk" trial courts' discretion to grant a jury trial where a proper demand has not been made to "determining whether the moving party's showing beyond mere inadvertence is sufficient to justify relief," *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 70 (2d Cir.1967). Thus, in this Circuit, "what appears to be a broad grant of discretion in the rule ... has been narrowed ... to the point where a party must now demonstrate more than mere inadvertence in failing to make a timely demand." *Palmer v. Angelica Healthcare Serv. Group, Inc.*, 170 F.R.D. 88, 90 (N.D.N.Y.1997).

*3 Tyco devotes most of its brief to arguing that it never knowingly withdrew its demand for a jury trial. This argument is unavailing, as the Court's March 22 order put to bed any questions regarding the validity of the August 2005 CMP and defendant's waiver of its right to a jury trial. The parties' formal proposal to the Court, and the Court's acceptance, of a CMP providing for a non-jury

trial constitutes an express waiver of a jury trial. The very purpose of including such a term in the Court's standard form CMP is to eliminate later litigation about trial issues by either securing the parties' agreement about how a case is to be tried or at least surfacing disagreement at an early stage of the case. Rather than raising the issue with the Court in August 2005-either by moving at that time under Rule 39(b) or by pointing to the publicly docketed October 2002 CMP, see *Palmer*, 170 F.R.D. at 89 (holding that failure to make jury demand was cured by, among other factors, plaintiff's timely request for a jury trial in a case management order)-Tyco agreed to settle the matter by agreeing to an order specifying a non-jury trial.

That waiver was knowing and voluntary in any normal sense of the words; Tyco does not contend that it was unaware of the content of the August 2005 CMP. Tyco argues, however, its agreement to the CMP was not really knowing because it was based on the mistaken impression that Tyco had not filed an initial jury demand, an error it only recently discovered. This argument is no more successful. Tyco gives no plausible explanation for its failure to recall whether it had sought a jury trial. The copy of the undocketed jury demand now presented to the Court was apparently in counsel's case file the entire time. Despite a change in counsel, Tyco cannot argue that it was unaware of its own actions in this litigation, or that its attorneys were ignorant of information in their own files. Moreover, the signed and docketed October 2002 CMP should have alerted counsel that the Court had already entered an order providing for a jury trial. Tyco's decision to stipulate to a non-jury trial cannot be ignored as based on an excusable mistake; to the extent there was any mistake, it was in excusable.

The same facts doom Tyco's Rule 39(b) argument. Tyco contends that "[e]ven if Tyco's conduct somehow did amount to an intentional waiver of its timely jury demand, the Court still may exercise its discretion ... to order that the case is to be tried by a jury ... in a situation where a party has indicated its intention to demand a jury trial from the inception of the case." (Def. Reply 5.) Defendant cites *Palmer* in support of this proposition. *Palmer*, however, is inapposite. In *Palmer*, the court refused to strike the plaintiff's jury demand despite the fact that no jury demand was initially served on defendant. However, the plaintiff did indicate a jury request on the docket sheet, included a request for a jury in the case management order, confirmed the request at the

initial pretrial conference, and included a jury provision in the pretrial scheduling order. *Palmer*, 170 F.R.D. at 89. Months later, the defendant realized the absence of a formal jury demand, and the court then ordered the plaintiff to make such a demand. *Id.* In upholding the plaintiff's demand, the *Palmer* Court noted that the plaintiff's initial service of the case management order, which included a jury demand, served to put the defendant on notice from the inception of the litigation, and that both parties acted throughout the proceedings with the expectation that the trial would be to a jury. *Id.* at 90.

*4 Palmer is perhaps comparable to the posture this case would have been in had Tyco made its Rule 39(b) application in August 2005. Even if it had not discovered the missing jury demand, Tyco would then have been well placed to argue that the parties and the Court had agreed to a jury trial in October 2002, and that the parties' settled expectation was that the case would be tried to a jury. The case is no longer in that posture, however. Unlike the situation in Palmer, plaintiff and defendant here have been under the impression that the case would be tried without a jury since the parties' agreement to the CMP in August 2005. Tyco did not simply fail to observe a procedural formality of the sort excused by the Palmer Court. Quite to the contrary, Tyco affirmatively agreed that the case would not be tried by a jury. Tyco has not demonstrated a reason better than "mere inadvertence" for its failure to insist on a jury trial. On the contrary, Tyco made a deliberate decision to agree to a bench trial, even if that decision was based on an understanding that later turned out to be mistaken. See Westchester Day Sch. v. Village of Mamaroneck, 363 F.Supp.2d 667, 673 (S.D.N.Y.2005) (rejecting defendant's Rule 39(b) motion, even in light of changed circumstances, because defendant initially decided not to request a jury trial).

At the time the parties agreed to the August 2005 CMP, defendant's counsel-under the impression that defendant had not filed a jury demand-decided to consent to a bench trial instead of moving under Rule 39(b) for a jury trial. For whatever reason, defendant decided at that time that the value of a jury trial did not merit a jury demand or the filing of a Rule 39(b) motion. Now, after consenting to a bench trial and then belatedly discovering the prior jury demand, defendant's calculus and strategy have changed. The reason for this change is immaterial-untimely jury demands based on a change in strategy are routinely

rejected in this district. See, e.g., Alvarado v. Santana-Lopez, 125 F.R.D. 367 (S.D.N.Y.1984).

Finally, Tyco argues that, with trial many months away, there is little likelihood that plaintiff will be prejudiced by the change from a bench trial to a jury trial. The fact that plaintiff might not suffer any prejudice from the granting of a jury trial does not compel that defendant's request be granted. Prejudice to the non-moving party is not a factor to be considered unless the moving party can first demonstrate more than inadvertence in waiving its right to a jury trial. See Westchester Day Sch., 363 F.Supp.2d at 674 n. 8 (stating that lack of prejudice does not cure failure to make a showing of more than mere inadvertence). Compare Higgins v. Boeing Co., 526 F.2d 1004, 1007 (2d Cir.1975) (considering prejudice to nonmoving party in Rule 39(b) motion in a removal action, where Noonan does not apply), with Noonan, 375 F.2d at 70 (limiting district court discretion without considering prejudice to non-moving party), and Cascone, 702 F.2d at 393 (stating that Noonan "shall continue to govern cases where it is applicable").

*5 In August 2005 Tyco was under the mistaken impression that it had not filed a jury demand. At that time, Tyco decided to consent to a trial without a jury instead of filing a Rule 39(b) motion or attempting to hold plaintiff to a prior CMP that called for a jury trial. Six months later Tyco discovered that it had filed a jury demand, and its litigation strategy regarding the importance of a jury trial and the desirability of filing a Rule 39(b) motion changed. Tyco offers no explanation for its decision not to file a Rule 39(b) motion in August. This change in strategy does not suffice to show more than mere inadvertence on the part of defendant. Accordingly, Tyco's motion is denied.

All Citations

Not Reported in F.Supp.2d, 2006 WL 1628588

Footnotes

- The copy of the demand attached to Tyco's motion papers bears a stamp indicating it 1 was received by the Court in White Plains. The instant action, however, was filed, and has always been pending, in the Manhattan courthouse. The failure of the Clerk's Office to docket the demand may be attributable to Tyco's attempt to file it in the wrong courthouse. In any event, the document bears the correct docket number, and it presumably should have made its way to the proper file.
- The rule expressly permits the Court to order a jury trial only in cases of "the failure of a party to demand a jury in an action in which such a demand might have been made as of right." The Court assumes, and the parties agree, that the rule similarly permits the Court to relieve a party that has first made, and then withdrawn, such a demand.

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit Y

Only the Westlaw citation is currently available.
United States District Court, S.D. Florida,
Miami Division.

CX DIGITAL MEDIA, INC., Plaintiff,
v.
SMOKING EVERYWHERE, INC., Defendant.

No. 09–62020–CIV. | March 23, 2011.

Attorneys and Law Firms

Andrew Benjamin Boese, Robert Mark Brochin, Morgan, Lewis & Bockius, Miami, FL, for Plaintiff.

Kevin Lawrence Hagen, Hagen & Hagen, Fort Lauderdale, FL, Gregory J. Blackburn, Russel Lazega PA, Miami, FL, for Defendant.

ORDER SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

CECILIA M. ALTONAGA, District Judge.

*1 THIS CASE was tried to the Court over five days beginning January 18, 2011. The Court has carefully considered the testimony of the witnesses, the exhibits admitted in evidence, the parties' written submissions, and the applicable law. Based on its review of the record and pursuant to Federal Rule of Civil Procedure 52(a) (1), the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

Defendant, Smoking Everywhere Inc. ("Smoking Everywhere"), sold through its website an alternative to regular cigarettes called "electronic cigarettes," "E–Cigarettes," or "E–Cigs." (Trial Tr. III 4:22–5:8 [ECF No. 55]). To generate web traffic to its site and increase sales of E–Cigs, Smoking Everywhere approached Plaintiff, CX Digital Media, Inc. ("CX Digital"), about a free-trial offer that Smoking Everywhere wanted to promote. (*See* Trial Tr. II 43:12 [ECF No. 54]).

CX Digital provides "advertising solutions" through "affiliate marketing." (Trial Tr. I 54:22–55:9 [ECF No. 53]). More simply put, CX Digital acts as a middleman between its network of affiliates or "third-party publishers," who purchase or provide advertising on the internet ("CX Affiliate [s]"), ² and businesses that want to advertise online ("CX Client[s]"). ³ (*Id.* 55:16–56:16). How this works in practice is a bit technical.

CX Digital has relationships with approximately 10,000 independent affiliates. (*See* Trial Tr. I at 55:6). These affiliates are typically small entrepreneurs who purchase advertising space on web sites, social media sites, or who do direct emailing. (*See id.* at 55:3–5, 57:1–3; Trial Tr. II at 44:2–4). When CX Digital enters an agreement called an "insertion order" with a new Client (*see* Trial Tr. I at 14:15–17), CX Digital may work with the Client to design a campaign and to design appropriate web pages for the campaign (*see id.* at 56:1–3).

CX Digital makes the Client's campaign available to CX Affiliates, who place advertisements for the CX Client's campaign. (See id. at 56:2–3). Each of the advertisements is clickable. When a consumer sees the ad, becomes interested in the product or service, and clicks on the advertisement, a process begins. A small text file called a "cookie" is placed on the consumer's computer. (See Trial Tr. I at 57:4–5). The cookie contains information identifying the CX Client and the CX Affiliate who placed the advertisement, and identifies itself as a CX Digital cookie. (See Trial Tr. I at 57:5–9). The advertisement also contains a Uniform Resource Locator ("URL") or web address that briefly directs the consumer to CX Digital's server. (See Trial Tr. I at 56:21–25, 106:15–20).

Upon arriving at the CX Digital server, CX Digital records which affiliate's advertisement was clicked on by the consumer. (*See* Trial Tr. I at 57:5–9, 125:6–18). The consumer is then redirected to the Client's "landing page," which contains the campaign offer details and a link to purchase the Client's product or service. (*See* Trial Tr. I at 57:12–20, 125:16–17). If the consumer decides to purchase the product, he or she places it in the "shopping cart" and then proceeds to a payment page. (*Id.*). On the payment page, the consumer enters credit-card information and clicks submit. (*See id.*). If the credit card is valid, the consumer reaches a confirmation or

"thank-you" page. (*Id.*). The thank-you page contains one or more small pieces of code called "pixels" ⁵ which look at the consumer's computer to determine how the user arrived at the thank-you page. (*Id.* at 61:11–24). In the case of the CX Digital pixel, the pixel searches the consumer's computer for a cookie placed by one of its affiliates and, if it finds one, sends a message back to the CX Digital server confirming a completed Sale. ⁶ (*Id.*).

*2 The completion of a Sale triggers two obligations. First, the Client owes CX Digital the unit price for a Sale, and second, CX Digital owes its referring affiliate a payment for a completed Sale. CX Digital pays its affiliates, usually on a weekly basis, even if it has not received payment from the Client. (See Trial Tr. I at 65:14–17, 66:3–13).

On August 4, 2009, Nick Touris, the vice-president of advertising for Smoking Everywhere (see Trial. Tr. I 39:13–18), entered an agreement, entitled Insertion Order #6921, with CX Digital on behalf of Smoking Everywhere (see Insertion Order 1). In the Insertion Order, Smoking Everywhere promised to pay \$45.00 to CX Digital for each completed Sale of the "Gold E-Cigarette Kit Free-Trial." (Id.). The term "Sale" is defined by the Insertion Order as "a consumer who accesses the content via a CX Digital link and completes a one-page registration consisting of: filling in the appropriate field of information and successful credit card submi[ssion].... No further action will be required from the consumer for the [cost per action] to be payable." (Id.).

During the month of August, CX Digital provided 670 Sales pursuant to the Insertion Order. (*See* Agreed Trial Ex. 2). CX Digital never provided more than 200 Sales on any given day in August; from August 13, 2009 until August 31, 2009, the average number of Sales per day was about 39. (*See* Pl.'s Trial Ex. 4; Trial Tr. I at 16:4–9). CX Digital invoiced Smoking Everywhere \$25,150.00 dollars for the 670 August Sales; the invoice reflected a \$5,000 deduction for a deposit that Smoking Everywhere had already made. (*See* Agreed Trial Ex. 2). Payment for the August invoice was due on September 15, 2009 (*see id.*); Smoking Everywhere has never paid that bill (*see* Trial Tr. I at 44:3–7).

On September 2, 2011, Touris and Pedram Soltani, an account manager at CX Digital, engaged in a daylong instant-message conversation covering a number of

topics, including the operation of "two new pages," and whether CX Digital would rely on its "best affiliate [who is] ... legit" to send "2000 orders/day by Friday." (Pl.'s Trial Ex. 2–2). The Court quotes at length from this conversation, which CX Digital contends memorializes a modification of the Insertion Order, because of its importance to the litigation and to preserve the context of the conversation.

The conversation began with a long, technical discussion about switching away from the ecig.smokingeverywhere.com link:

pedramcx [Pedram Soltani] (10:22:00 AM): good morning Nick!

pedramcx (10:22:23 AM): Have you placed the pixels for the two new pages?

pedramcx (10:22:44 AM): if so, then I can switch the ecig.smokingeverywhere.com link

pedramcx (10:22:48 AM): and we can do the test

pedramex (10:22:55 AM): for both campaigns

nicktouris (10:38:28 AM) pedram are you in?

pedramcx (10:38:33 AM): yes

pedramex (10:38:47 AM): just waiting for confirmation to switch the link

* * *

*3 nicktouris (10:38:55 AM): please send me both pixels and test links so we make sure we get this correct

pedramcx (10:38:47 AM): ok

(Pl.'s Trial Ex. 2–2). Touris had difficulty receiving the pixel by email, so Soltani sent it to him by instant message, and then the conversation continued with Touris complaining:

nicktouris (11:22:06 AM): this test link goes to the old ecig page http:// www.incentaclick.com/click/xde15fb9fe/test_6609/

* * *

pedramcx (11:24:23 AM): so are the pixels placed for both campaigns?

nicktouris (11:24:32 AM): yes

pedramcx (11:24:44 AM): ok ... so now I'm quickly switching the link

pedramcx (11:24:54 AM): and then you can do the test for both

pedramcx (11:25:02 AM): do the test for the old page first

pedramcx (11:25:06 AM): because it's set live

nicktouris (11:26:20 AM): both pages tested

nicktouris (11:26:40 AM): the old page has not been touched

pedramcx (11:27:12 AM): the test has to be done again because I'm still using the old link

pedramcx (11:27:22 AM): I wasn't going to use the new URL until you placed the pixel

pedramex (11:27:36 AM): I'm switching the link now, because the pixel is placed

nicktouris (11:27:45 AM): would you please give me a call

pedramcx (11:28:32 AM): yeah give me a sec

pedramcx (11:28:45 AM): I just switched the link for the old page to the new cxd2 page

pedramcx (11:28:49 AM): the test can be done now

pedramcx (11:29:30 AM): the test link showed up for the new non video page

pedramcx (11:29:34 AM): so we're good to go for that one

(*Id.*).

Touris and Soltani then discussed removing the 1–800 number from one of Smoking Everywhere's pages. (*See id.*). Soltani volunteered CX Digital to re-code some of Smoking Everywhere's pages and to send them back to Smoking Everywhere so that they could be uploaded. After those re-coded pages were running but "cut up" (*id.*), Touris told Soltani:

nicktouris (2:09:32 PM): http://www.incentaclick.com/click/mc973327df/test_6562/ is taking me to ecig

* * *

nicktouris (2:11:48 PM): when I type it in it take me to the old ecig page

pedramcx (2:12:04 PM): yeah ... sorry give me a second

pedramcx (2:12:08 PM): I guess it didn't save it

pedramcx (2:12:14 PM): let me switch the link again

pedramcx (2:12:15 PM): one sec

pedramcx (2:13:07 PM): done

pedramcx (2:13:16 PM): send the tests

nicktouris (2:19:34 PM): sent

(Id.).

After the discussion about switching the links, Soltani began a conversation about increasing the number of Sales CX Digital was sending Smoking Everywhere:

pedramcx (2:49:45 PM): A few of our big guys are really excited about the new page and they're ready to run it

pedramcx (2:50:08 PM): We can do 2000 orders/day by Friday if I have your blessing

*4 pedramcx (2:50:39 PM): You also have to find some way to get the Sub IDs working

pedramcx (2:52:13 PM): those 2000 leads are going to be generated by our best affiliate and he's legit

nicktouris is available (3:42:42 PM): I am away from my computer right now.

pedramcx (4:07:57 PM): And I want the AOR when we make your offer # 1 on the network

nicktouris (4:43:09 PM): NO LIMIT

pedramcx (4:43:21 PM): awesome!

(Id.).

The same day as this conversation, the number of Sales per day that CX Digital sent to Smoking Everywhere began to increase substantially. (*See Pl.*'s Trial Ex. 4). Between September 2, 2009 and September 23, 2009, CX Digital sent an average of 1,244 Sales per day, with a peak of 2,896 Sales on September 22, 2009. (*See id.*).

On September 10, Touris exchanged emails with Soltani about "non compliant pages." (Def.'s Trial Ex. 6–1). Touris complained that he had come across one site that had the wrong terms and was "advertising [the offer] as FREE." (*Id.*). Touris specifically observed:

I just noticed [the non-compliant page] has the old terms at the bottom of the page ... need updated terms below.

http://cxd1.smokingeverywhere.com/terms.html

(*Id.*). Soltani acknowledged these complaints and responded by sending an email to CX-Digital affiliate managers advising them

[T]here is zero tolerance when it comes to promoting the E-cigs as a quit smoking/smoking cessation device or any allusion whatsoever to a quit smoking aid. The offer cannot be pushed as [sic] "Doctor" or "Medically" recommenced product either. Publishers caught doing this will receive an initial warning to make changes to their page and will be cut off from the offer if caught doing it again Have your guys promote the offer the same as on our landing page.

(Def.'s Trial Ex. 6–2).

CX Digital took Smoking Everywhere's free-trial offer off its network on September 23 or 24, 2009 because Smoking Everywhere had not paid the August invoice. (*See* Trial Tr. I at 182:4–15). On October 2, 2009, Soltani emailed Touris:

As per our conversation, I just wanted to confirm that we will receive the wire for the outstanding balance owed to us by Monday, October 5, 2009. Once we receive the wire we will set the offer back live

as everybody has been requesting it. Please confirm!

(Pl.'s Trial Ex. 5–3). Smoking Everywhere missed the October 5 payment deadline, and on October 7, 2009, Soltani again emailed Touris, seemingly in response to complaints about fraud, and explained,

There definitely isn't any incentivized traffic and the fraud has NOTHING to do with the nature of the page. The fraud simply comes from identity theft and fake parameters being entered into the Smoking Everywhere landing page. By having sub ids in place, you guys can see the pattern of which affiliates are sending the fraud. You must let us know within 4-5 days of the fraud occurrence so we can cut off that affiliate and do the chargeback for you guys. As of the moment, it's way past that timeline and too late as we've paid our affiliates You guys need to wire us the money today so that we can turn the offer back live.

*5 (Def.'s Trial Ex. 6–3).

At the end of September, CX Digital sent a second invoice for both August and September 2009. (*See* Agreed Trial Ex. 2). That invoice demanded that Smoking Everywhere pay a balance of \$1,339,419.00 upon receipt. (*See id.*). That figure included a price increase from \$45.00 to \$51.00 per Sale for 17,294 Sales between September 14 and 23, 2009. (*See* Trial Tr. I at 23:19–20). CX Digital acknowledges that Smoking Everywhere paid a \$5,000.00 deposit when it entered the Insertion Order. (*See id.* at 185:7–8). Accordingly, CX Digital asserts Smoking Everywhere owes it \$1,260,805.00, which Smoking Everywhere has not yet paid. The Complaint contains one count alleging breach of contract, and in addition to compensatory damages, seeks attorney's fees pursuant to the Insertion Order.

II. CONCLUSIONS OF LAW

As a preliminary matter, the Court notes the Insertion Order provides, and the parties agree, the interpretation of the Insertion Order is governed by the laws of the State of Delaware. (See Trial Ex. 1 at 4; Trial Tr. I at 48:16–19).

A. The Insertion Order

Smoking Everywhere does not dispute it signed the Insertion Order and that the Insertion Order constitutes a valid contract between CX Digital and Smoking Everywhere. (See Trial Tr. III 31:9–11) (Plaintiff's Counsel: "You admit that Smoking Everywhere entered into a valid contract with CX Digital. Correct?" Elicko Taieb: "That's Correct."); see also Trial Tr. III at 5:12–13).

As will be discussed below regarding the alleged instantmessage modification of the Insertion Order, Defendants contend they should not have to pay under the Insertion Order because: (1) CX Digital breached the Insertion Order by sending more than 200 Sales per day, (2) CX Digital breached the Insertion Order by sending traffic to URLs other than those listed on the Insertion Order, (3) much of the traffic was generated by misleading ads placed by CX Affiliates, and (4) many of the Sales supplied by CX Affiliates used fraudulent credit cards. However, none of these arguments apply to the August invoice.

First, there is no dispute that CX Digital performed its obligations under the Insertion Order during the month of August by providing fewer than 200 Sales per day. (See Pl.'s Trial Ex. 4; Trial Tr. I at 4–11). Second, there is no dispute that all of the traffic CX Digital sent to Smoking Everywhere in August was directed to the URLs listed in the Insertion Order; the president of Smoking Everywhere, Elicko Taieb, conceded this. (See Trial Tr. III at 72:20–73:23 ("I think they did it—I believe from checking afterwards that they did it for the first month and they didn't do it for the second month.")). Third, there is no evidence in the record that any of 670 Sales sent by CX Affiliates during August were procured through misleading or false information in the affiliates' ads, or that any of the August Sales were fraudulent.

*6 Smoking Everywhere appears to be refusing to pay the August invoice because Smoking Everywhere has not received an itemized bill that would allow it to check to see if there were misleading ads or there was fraud. (*See* Trial Tr. III 33:25–34:8). However, on this point the Insertion Order provides,

If any certain downstream [CX] affiliate violates the terms and

conditions of [Smoking Everywhere] —and [Smoking Everywhere] can provide documentation to Company proving fraud beyond a reasonable doubt with a maximum of five (5) days the lead/sale or any other CPA violation then [Smoking Everywhere] will not be responsible for paying monies owed for the traffic and fraudulent [sales] general by that certain [CX] affiliate ... Time shall be of the essence.

(Insertion Order ¶ 17). As stated, there is no evidence of any misleading advertisement causing a Sale or any fraudulent Sale generated by CX Affiliates during August 2009 in the record—much less anything of the specificity required under the Insertion Order. Smoking Everywhere's belated desire to scrutinize the Sales generated by individual CX Affiliates so that it can search for evidence of Sales attributable to misleading ads or fraud does not excuse it from paying what it owes for the Sales generated by CX Affiliates in August 2009. Accordingly, Smoking Everywhere is liable for the full amount due under the August invoice.

Smoking Everywhere also contends that, beginning in early September, CX Digital breached the Insertion Order by sending more than 200 Sales per day and by sending those Sales to the wrong landing page URLs. CX Digital does not dispute it engaged in this conduct, but it argues it was performing in accordance with the modified Insertion Order. Because Smoking Everywhere's allegations of breach by CX Digital turn on whether there was an enforceable modification to the Insertion Order, these arguments are addressed below in the discussion of the alleged changes.

B. Modification of the Insertion Order

The central dispute in this case is whether the Insertion Order was modified to permit an unlimited number of leads to be sent to two new URLs that were different from the URLs listed in the Insertion Order. This raises two questions: (1) did Touris and Soltani agree to modify the Insertion Order during their September 2, 2009 instantmessage conversation; and if so, (2) is their agreement to modify the contract enforceable?

1. Agreement to Modify Insertion Order

CX Digital contends the September 2, 2009 instantmessage conversation between Touris and Soltani modified two aspects of the Insertion Order. According to CX Digital, it (a) changed the URLs to which CX Digital was supposed to send traffic, and (b) it eliminated the 200– Sale–perday limit.

"The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act." RESTATEMENT (SECOND) CONTRACTS § 19 (1981). Under Delaware law, "overt manifestation of assent—not subjective intent—controls the formation of a contract; [and] the 'only intent of the parties to a contract which is essential is an intent to say the words or do the acts which constitute their manifestation of assent'; ... 'the intention to accept is unimportant except as manifested.' "Indus. Am., Inc. v. Fulton Indus., Inc., 285 A.2d 412, 415 (Del.1971) (quoting RESTATEMENT § 20).

a. Change of Target URLs for CX Digital Affiliate Traffic

*7 In the "Campaign Details" section on the first page of the Insertion Order, the term "URL" appears in bold type followed by two internet addresses for Smoking Everywhere landing pages: http://ecig.smokingeverywhere.com and http://special.smokingeverywhere.com. (Agreed Trial Ex. 1). CX Digital contends Touris and Soltani agreed to change the URL term during their September 2, 2009 instant-message conversation and to send CX Affiliate traffic to two new landing pages: cxd1.smokingeverywhere.com and cxd2.smokingeverywhere.com. (*Cf.* Trial Tr. II 59:25–60:1; *see also* Pl.'s Trial Ex. 2–2 ("[Soltani]: I just switched the link for the old page to the new cxd2 page.")).

A close reading of the instant messages and careful consideration of the behavior of the parties during the conversation indicate clear assent on the part of both parties to stop sending traffic to the "old" ecig link and to begin sending the traffic to the two new URLs. Soltani asks Touris, "Have you placed the pixels for the *two* new pages?" Soltani adds, "if so, then I can switch the ecig.smokingeverywhere.com link ... and we can do the test ... for *both* campaigns." (Pl.'s Trial Ex. 2–2) (emphasis added). Apparently, Touris had not yet received the new pixels Soltani was referring to, so Touris asks, "please

send me *both* pixels and test *links* so we make sure we get this correct." (*Id.*) (emphasis added). Soltani complies by sending the pixels by instant message. ⁸

After receiving the pixel files by instant message, Touris places the two new pixels so that CX Digital can track Sales on the new pages, and Soltani then says "ok ... so now I'm quickly switching the link." (Id.). This switch has to be repeated several times before it works properly. (See id.). During the process, Touris twice observes that the test links lead to the "old page" which "has not been touched," and shortly thereafter complains another test link also takes him to "ecig." (Id.). Soltani responds to each of these complaints by switching the link again. (See id.). These actions do not make any sense unless the parties had agreed to switch the URLs to which CX Affiliate traffic was being directed. Moreover, Touris and Soltani ran tests on the new links and pixels to make sure the new pixels fired and notified CX Digital of the test Sales, which confirms that the links were to be used for CX Affiliate traffic. (See id.).

Beginning the day of the instant-message conversation and continuing until CX Digital terminated the Insertion Order for non-payment, CX Digital sent all of its affiliate traffic to the exd1 and exd2 URLs (see Trial Tr. I at 45:13-21); Smoking Everywhere never complained (see id. at 72:13–19). The Court acknowledges that Smoking Everywhere maintains it was unaware CX Digital was sending traffic to the new URLs ¹⁰ (see Trial Tr. II at 52:1-7; Trial Tr. III at 68:2-8; but see Trial Tr. 125:8-10 ("We had discussed Pedram at one point switching pages out, ... and a couple of proposed pages were the CXD, CXD1, I think, and CXD2.")), but this is belied by the instant-message conversation between Touris and Soltani and is further undermined by an email sent by Touris on September 10, 2009. (See Def.'s Trial Ex. 6–1). In that email, Touris tells Soltani a CX Affiliate should update his ad to contain the terms located at "http:// cxd1.smokingeverywhere.com/terms." (Id.).

*8 Moreover, during the early part of September, Touris was monitoring the content of CX Affiliate ads by reading and clicking on them; at that time, because all the CX Digital traffic was being directed to the new "cxd" pages, he would have been able to see that the CX Affiliate traffic was directed to those pages and not to the URLs on the Insertion Order. (See Trial Tr. II

at 97:2–98:10). Touris's words and actions during the September 2nd instant messages with Soltani indicating CX Digital should send its affiliate traffic to the cxd URLs demonstrate an overt manifestation of assent on the part of Smoking Everywhere to modify the Insertion Order to permit the web traffic to be directed to the cxd URLs. ¹¹ Therefore, Touris agreed on behalf of Smoking Everywhere to modify the URL term of the Insertion Order. ¹²

b. Removal of the Limit on the Number of Sales Per Day In the "Campaign Details" section on the first page of the Insertion Order, the term "VOLUME:" appears in bold type followed by "200 leads/day." (Agreed Trial Ex. 1).

Insertion Order, the term "VOLUME:" appears in bold type followed by "200 leads/day." (Agreed Trial Ex. 1). CX Digital contends Touris and Soltani agreed to remove the limit on the number of leads or Sales per day during their September 2, 2009 instant-message conversation.

After the discussion between Touris and Soltani about switching the URLs, Soltani sends an offer to Touris: "We can do 2000 orders/day by Friday if I have your blessing [a]nd I want the AOR when we make your offer number one on the network." (Pl.'s Trial Ex. 5–2). Touris responds, "NO LIMIT." (Id.). CX Digital argues that Touris accepted Soltani's offer by saying "NO LIMIT." The Court agrees a contract was formed but clarifies that Touris's response acted as a rejection and counter-offer that Soltani accepted by then replying "awesome!" (Id.).

"In order to constitute an 'acceptance,' a response to an offer must be on identical terms as the offer and must be unconditional." *PAMI–LEMB I Inc. v. EMB–NHC, L.L. C.*, 857 A.2d 998, 1015 (Del.Ch.2004) (citing *Friel v. Jones*, 206 A.2d 232, 233 (Del.Ch.1964); RESTATEMENT § 58). "A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." RESTATEMENT § 59; *see also PAMI–LEMB I*, 857 A.2d at 1015 n. 80. "The words and conduct of the response are to be interpreted in light of all the circumstances." *PAMI–LEMB I*, 857 A.2d at 1015 n. 81 (citing RESTATEMENT § 202).

Here, Touris's response of "NO LIMIT" varies from the two specific terms Soltani offered and so acts as a counter-offer. Soltani proposed CX Digital provide 2,000 Sales per day and that CX Digital be the AOR or agent of record (*see* Pl.'s Trial Ex. 5–2), a term of art meaning the exclusive provider of affiliate advertising on the advertising campaign. (*See* Trial Tr. II at 119:25–120:9). Touris makes a simple counter-offer that there be no limit on the number of Sales per day that CX Digital's affiliates may generate (*see* Pl.'s Trial Ex. 5–2) and makes no mention of the AOR term. Soltani enthusiastically accepts the counter-offer by writing, "awesome!" ¹³ (*id.*) and by beginning to perform immediately by increasing the volume of Sales (*see* Pl.'s Trial Ex. 4).

*9 Touris testified he could have been responding to something other than Soltani's offer of 2,000 Sales per day when he said "NO LIMIT." (See Trial Tr. II at 118:20-25). Touris acknowledged that he had engaged in contract negotiations about "changing the number of leads, changing URLs, deposits, that type of thing" (Mar. 8 Trial Tr. ¹⁴ at 11:3–5), although he added, "we mainly spoke on the phone. A little bit of email but I had trouble receiving his emails so I mean we used Instant Messaging but you know there was a lot more than what was presented here, last court appearance." (Id. at 12:13– 16). The implication of this testimony was that Touris could have been responding to something else he and Soltani had discussed by phone. But when pressed on just what else he could have been referring to when he said "NO LIMIT," Touris's memory failed him. In particular, he denied that "NO LIMIT" was some kind of personal motto. 15 (See Trial Tr. II at 119:6–7).

Indeed, neither Touris nor Taieb ever suggested any plausible alternative interpretation for why Touris wrote "NO LIMIT" to Soltani, nor did they explain the content of the alleged additional negotiations that took place outside of the September 2, 2009 instant messages or what effect those would have had on the apparent agreement the parties reached on September 2nd. Considering Touris's admission that he was engaged in instant-message negotiations with Soltani about changing the number of leads along with the September 2nd instant-message transcript, directs the conclusion that those negotiations, wherever and however they occurred, culminated with a modification of the Insertion Order when Touris and Soltani agreed to "NO LIMIT."

Smoking Everywhere also observes that a significant amount of time—almost two hours—passed between Soltani's offer of 2,000 Sales per day and Touris's counter-

offer of "NO LIMIT," which it suggests adds uncertainty to the meaning of the conversation. (*See* Trial Tr. II at 133:17–134:10). However, more than an hour passes before Soltani added that he would like CX Digital to be the AOR; yet this is clearly part of Soltani's offer. It is then only thirty-four minutes later that Touris responds "NO LIMIT." Given that Touris testified he would not have approved such an increase without first discussing it with Taieb (*see*, *e.g.*, Mar. 8 Trial Tr. at 9:12–16), one explanation for the time delay, if one is needed, is that Touris was doing just that—asking Taieb for approval. ¹⁶

2. Enforceability of the Modifications

Smoking Everywhere contends that even if it and CX Digital agreed to modify the Insertion Order, the modification is not enforceable for several reasons. First, an oral modification of a contract must be proven with "specificity and directness." (Def.'s Proposed Order ¶ 114 [ECF No. 61]). Second, the language of the Insertion Order provides that it "may be changed only by a subsequent writing signed by both parties" (Insertion Order ¶ 16), and Smoking Everywhere did not waive this provision. (Def.'s Proposed Order ¶ 119–120). Third, "the Defendant did not give the required consideration for any modifications to the initial insertion order, thus the alleged changes to the insertion order are not enforceable." (Id. ¶ 137). Fourth, Touris lacked the authority to bind Smoking Everywhere. (See id. ¶¶ 145). Lastly, Smoking Everywhere also raises the defenses of commercial frustration, violation of the implied covenant of good faith and fair dealing, and mutual mistake. These defenses are addressed in turn.

a. Specificity and Directness

*10 Drawing from Delaware case law, Smoking Everywhere contends "[a] party asserting an oral modification must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document." "Cont'l Ins. Co. v. Rutledge & Co., 750 A.2d 1219, 1230 (Del.Ch.2000) (quoting Reeder v. Sanford School, Inc., 397 A.2d 139, 141 (Del.1979)). In particular, Smoking Everywhere relies on Reserves Dev. LLC v. Severn Sav. Bank, FSB, No. 2502–VCP, 2007 WL 4054231, at *10 (Del.Ch. Nov.9, 2007). The court in that case found a series of emails in the "record [was] not sufficiently 'specific and direct' to support a conclusion that the parties orally modified

an existing written contract." ¹⁷ *Id.* Smoking Everywhere contends that in this case, the instant messages between Touris and Soltani are not specific and direct enough evidence that it agreed with CX Digital to modify the Insertion Order. (*See* Def.'s Proposed Order ¶ 118). This argument resembles the formation arguments discussed above, and as stated there, when the parties' statements and conduct are considered, the parties' intent to modify the Insertion Order to change target URLs and to remove the limit on the number of Sales is clear, specific, and direct.

With respect to the agreement to change URLs, the instant messages not only contain statements indicating the parties had agreed to switch from the old ecig link to the new cxd links, but actually record the parties' efforts to switch the links as they go through that technical process. (See, e.g., Agreed Trial Ex. 2–2 ("[Soltani]: I'm switching the link now, because the pixel is placed I just switched the link for the old page to the new cxd2 page the test can be done now the test link showed up for the new non video page.")). It is difficult to imagine more specific and direct evidence of an agreement than the two parties actually sitting down simultaneously and doing what they had agreed to do. Therefore, the modification of the target URLs in the Insertion Order is supported by specific and direct evidence.

The agreement to modify the Insertion Order to remove the limit is also supported by specific and direct evidence. As discussed, during the September 2nd instant messages, Touris made a counter-offer of "NO LIMIT" in response to Soltani's offer of 2,000 leads per day with AOR status for CX Digital. Soltani accepted the counter-offer. This modification clearly changed the "VOLUME" term in the details contract of the Insertion Order from 200 per day to unlimited. The language in the instant messages and the increase in the volume of leads that immediately follows provide specific and direct support that the change was intended.

Moreover, the *Severn Savings* case is easily distinguished from this case. The court there held "the evidence fails to indicate directly and specifically the intended terms of the purported oral modification of the PSA to change the party responsible for effectuating construction of the infrastructure." *Severn Sav. Bank, FSB,* 2007 WL 4054231, at *10. This quote reveals two major differences from the modification in this case.

*11 First, the scope and complexity of the modifications alleged in Severn Savings far exceed the narrow and straightforward changes here. In Severn Savings the alleged modifications were, very generally, that "Reserves [be substituted for] Bella Via as the party responsible for arranging construction of the infrastructure," and "Reserves [be substituted] for Bella Via as an intended beneficiary of the Construction Trust Agreement." Id. at *9. The emails in Severn Savings showed the parties discussing potential payment arrangements on two letters of credit, but evidence of an agreement "to change the party responsible for effectuating construction of the infrastructure" was only "sketchy" and "muddled." Id. at *9-10. Reading the emails excerpted in Severn Savings, one has the impression that the parties had discussed different options orally, but never reached any agreement. The emails were a continuation of the oral negotiations that tried to pin down the details of the parties' obligations. In this case, although there may have been conversations by phone, once the parties agreed to switch the URLs, they did so; and once the limit was removed on the number of Sales per day, CX Digital began to send more—no further negotiation was needed. The instant messages therefore, rather than showing continued debate like the emails in Severn Savings, show the parties had come to an agreement.

Second, the emails in Severn Savings were provided as evidence of an oral modification that had specific terms, not as a record of those specific terms. ¹⁸ Here, the instant messages operate collectively as an unsigned writing containing the terms of the agreement to modify the Insertion Order. CX Digital is not alleging there are additional oral terms to the modification that are not evident from the instant messages. In fact, unlike in Severn Savings, Smoking Everywhere and CX Digital do not argue about what the specific terms of the alleged modification are, but about whether the modification actually occurred. See Cont'l Ins. Co. v. Rutledge & Co., 750 A.2d 1219, 1230 (Del.Ch.2000) ("The parties in this case argue over the very existence of the oral modification of the Agreement, not the certainty or ambiguity of its terms."). As already discussed, the instant-message conversation and the parties' conduct surrounding it provide specific and direct evidence the parties agreed to modify the Insertion Order.

b. The Signed-Writing Clause

The Insertion Order provides it "may be changed only by a subsequent writing signed by both parties." (Insertion Order ¶ 16). Delaware follows the common law rule with respect to "no oral-modification clauses" or signed-writing clauses. ¹⁹ The common law rule is that "an oral agreement is sufficient to modify or rescind a written contract, notwithstanding a provision in the written contract purporting to require that subsequent modifications be evidenced by writing." WILLISTON ON CONTRACTS § 29.42 (4th ed.1999) (citing RESTATEMENT § 149). On this point, the Supreme Court of Delaware has held:

*12 We think, therefore, that a written agreement between contracting parties, despite its terms, is not necessarily only to be amended by formal written agreement. We agree with Stanchifield that a written agreement does not necessarily govern all conduct between contracting parties until it is renounced in so many words. The reason for this is that the parties have a right to renounce or amend the agreement in any way they see fit and by any mode of expression they see fit. They may, by their conduct, substitute a new oral contract without a formal abrogation of the written agreement. We think the existence of Paragraphs 16 in the plaintiffs' appointments does not prohibit the modification of making of a new agreement by conduct of the parties, despite a prohibition of Paragraphs 18 against any change except by written bilateral agreement.

Pepsi-Cola Bottling Co. of Asbury Park v. Pepsico, Inc., 297 A.2d 28, 33 (Del.1972); see also J.A. Moore Const. Co. v. Sussex Assocs. Ltd. P'ship, 688 F.Supp. 982, 988 (D.Del.1988). In this case, the modification was not oral, but appeared in writing ²⁰ in an instant-message conversation. Nevertheless, the same principle applies to this informal, unsigned writing as to an oral modification. See Haft, 841 F.Supp. at 567 ("[A] written contract may be modified by agreements which themselves are not formally written."). Therefore, the instant-message conversation, as an unsigned writing, suffices under Delaware law to modify the Insertion Order despite the signed-writing clause and notwithstanding the Court's preliminary observation stated during the trial.

Nevertheless, even if the instant-message conversation did not qualify as an enforceable modification under Delaware law and the signed-writing clause of the Insertion Order were enforceable, Smoking Everywhere would have waived the provision because, following the instant messages, CX Digital materially changed its position in reliance ²¹ on Touris's statements. "[W]here, following the oral modification, one of the parties materially changes position in reliance on the oral modification, the courts are in general agreement that the other party will be held to have waived or be estopped from asserting the no oral modification clause." WILLISTON § 29:42.

There is no dispute that after the September 2nd instant-message conversation between Touris and Soltani, CX Digital began to send an increased number of Sales to two new URLs. CX Digital did this because it believed Touris had agreed with Soltani to modify the Insertion Order; that is, CX Digital relied on the instant messages to change the course of its performance. (*See* Trial Tr. I at 143:15–17, 145:13–19). As discussed, Smoking Everywhere was aware of both changes and did not complain. Accordingly, Smoking Everywhere is estopped from asserting the signed-writing provision of the Insertion Order as a defense.

c. Consideration for the Modifications

*13 Smoking Everywhere argues "Defendant did not give the required consideration for any modification to the initial insertion order, thus the alleged changes to the insertion order are not enforceable." ²² (Def.'s Proposed Order ¶ 137). "Delaware courts define consideration as a benefit to a promisor or a detriment to a promisee pursuant to the promisor's request." *Cont'l Ins., 750 A.2d at 1232; *see also RESTATEMENT § 75 ("[A] promise which is bargained for is consideration."). In exchange for CX Digital's promise to provide an unlimited number of Sales to Smoking Everywhere, Smoking Everywhere made an implied promise to pay for those additional Sales at the rate defined in the Insertion Order—\$45 per Sale. Smoking Everywhere's implied promise to pay is the consideration for CX Digitial sending more Sales.

With respect to the agreement to switch URLs, the Court acknowledges there is no consideration for this change; however, as explained, CX Digital reasonably and foreseeably materially changed its position in reliance on

that modification. "A promise modifying a duty under a contract not fully performed on either side is binding ... to the extent that justice requires enforcement in view of material change of position in reliance on the promise." RESTATEMENT § 89. After the September 2nd instant messages, having spent much of the day working with Touris to switch the URLs and place new pixels, CX Digital began to send Sales to the new URLs. CX Digital's actions were reasonable and foreseeable in light of Touris's statements and actions during that conversation, and CX Digital's change in position was material because it had to pay its affiliates for the additional Sales. Accordingly, justice requires that Smoking Everywhere be estopped from denying that it agreed to change the target URLs.

4. Authority of Touris to Bind Smoking Everywhere

Smoking Everywhere contends that even if Touris intended to modify the Insertion Order during the September 2nd instant-message conversation, he lacked the authority to bind Smoking Everywhere to the modification. Under Delaware law, "[a]pparent authority may be defined as that authority which, though not actually granted, the principal knowingly or neglignetly [sic] permits the 'agent' to exercise or which he holds him out as possessing." Finnegan Const. Co. v. Robino-Ladd Co., 354 A.2d 142, 144 (Del.Super.Ct.1976). "If a third party relies on the agent's apparent authority in good faith and is justified in doing so by the surrounding circumstances, the principal is bound to the same extent as if actual authority had existed." Old Guard Ins. Co. v. Jimmy's Grille, Inc., 860 A.2d 811, *3 (Del.2004) (unpublished table decision).

A number of indicia of Touris's authority to bind Smoking Everywhere were apparent to Soltani. First, Touris was vice-president of marketing for Smoking Everywhere; it was reasonable to assume that the vice-president of marketing by virtue of his title could enter an advertising agreement on behalf of his company. Second, Touris negotiated and signed the original Insertion Order; it was reasonable to assume that the person who signed a contract on behalf of a company had the authority to subsequently modify that agreement. Third, with respect the URL change, Touris worked side-by-side with Soltani to change and test the new URLs and pixels; this shows that Touris either had, or thought he had, the authority to modify the agreement to change the URLs because as soon as he agreed to make the change, he personally implemented it. Under those circumstances it would have

been *unreasonable* for Soltani to conclude that Touris *did not* have the authority to modify the Insertion Order.

*14 There is one wrinkle however. Touris testified that before the Insertion Order was signed, while he was negotiating with Soltani, he told Soltani that prior to any agreement he would need to show the proposed contract to Taieb, the president of Smoking Everywhere, for his approval. (See Mar. 8 Trial Tr. at 6:1-3 ("[W]hen I initially in negotiated with Pedram I asked him to get me a contract so I could talk it over with Mr. Taieb and get it approved.")). Touris also testified that while negotiating the modifications to the Insertion Order, he told Soltani "give me a contract so I can take it back to [Taieb] and discuss with [him] to see if he wants to move forward with it." (Mar. 8 Trial Tr. at 16:3-5). If this were true, these statements may have made it unreasonable for Soltani to rely on Touris's other trappings of authority in concluding Touris could modify the Insertion Order, but the Court has grave doubts about the credibility of this testimony.

During the first four days of the trial, there was significant testimony that Touris had discussed the Insertion Order with Taieb and obtained his permission to sign it, but there was no argument or testimony from Smoking Everywhere that Touris had told Soltani he could not enter an agreement without Taieb's permission. In fact, during his opening statement, counsel for Smoking Everywhere had the following exchange with the Court:

MR. BLACKBURN: Nick Touris, who did some of the negotiating for [the Insertion Order], did not have the authority to contract for an assertion [sic] order of this type with these types of deals

THE COURT: What was his position with the company?

MR. BLACKBURN: I believe it's vice-president of marketing.

THE COURT: He was vice-president of marketing and he did not have the capacity to bind the company?

MR. BLACKBURN: Not in the way that the plaintiff is saying, Your Honor.

THE COURT: And when did you inform the plaintiff of that?

MR. BLACKBURN: When we got sued, which is shortly thereafter.

(Trial Tr. I at 39:7–40:1) (emphasis added).

It was only during his initial closing argument that Mr. Blackburn requested another day of trial to take additional testimony from Touris and Taieb. ²³ (See Feb. 16 Trial Tr. 44:4-9). The Court granted this request and the trial resumed on March 8, 2011. It was during this final day of the trial, that Touris testified for the first time —but very emphatically—that Soltani was aware Touris could not enter a contract without Taieb's permission. (See, e.g., Mar. 8 Trial Tr. at 16:3-5 ("In the end I said 'Well give me a contract so I can take it back to [Taieb] and discuss with [him] to see if he wants to move forward with it.' ")). The convenient appearance of this testimony and the comportment of the witnesses on the stand, combined with Mr. Blackburn's statement during the opening that Smoking Everywhere did not tell CX Digital that Touris lacked authority to enter contracts on its behalf until CX Digital sued them, lead the Court to conclude that as a matter of fact, Touris never told Soltani that he could not sign or modify the Insertion Order without Taieb's permission.

*15 Nevertheless, even if it were the case that Touris told Soltani he could not enter an agreement without Taieb's permission, the record does not indicate that Touris told Soltani that he had not obtained permission to change the target URLs or to remove the limit on the number of Sales. ²⁴ In fact, as noted, there was a time gap between Soltani's offer to send 2,000 Sales per day and Touris's counter-offer that there be "NO LIMIT." If it is true that Soltani was aware that Touris needed permission before he could agree to the modification, Soltani could have reasonably concluded that during that time gap Touris was obtaining any required permission from Taieb. ²⁵ Accordingly, Touris had the apparent authority to bind Smoking Everywhere and did so during the instantmessage conversation.

5. Frustration of Purpose and Commercial Frustration

Smoking Everywhere argues the Court should void or excuse it from performing under the modified Insertion Order because Smoking Everywhere's principal purpose was substantially frustrated by CX Digital sending too

many leads to the wrong URLs. (See Pl.'s Proposed Order ¶¶ 199–200). There are three problems with this argument. First, the principal purpose of the contract was for customers to sign up for the Smoking Everywhere free trial. Thousands signed up, so that purpose was achieved, not frustrated. Second, both frustration of purpose and commercial frustration require the frustration to have been no fault of the defendant. See Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 102 (3d Cir.1986); Wal-Mart Stores, Inc. v. AIG Life Ins. Co., No. 19875, 2005 WL 5757652, at *5 (Del.Ch. Apr.1, 2005). Here, the additional leads were sent to the new URLs because the vice-president of marketing at Smoking Everywhere asked that they be. Therefore, Smoking Everywhere shares fault in any alleged "frustration." Third, this argument is moot because the Court has concluded that Smoking Everywhere agreed to modify the Insertion Order to permit an unlimited amount of leads to be sent to the "cxd" URLs, and that CX Digital acted in accordance with the modified agreement. Therefore, neither frustration of purpose nor commercial frustration is an available defense in this case.

6. Violation of the Implied Covenant of Good Faith and Fair Dealing

Smoking Everywhere contends CX Digital breached the implied covenant of good faith and fair dealing by "act[ing] arbitrarily and unreasonably in not sending the traffic to the correct sites and sending more traffic than had been contracted." (Pl.'s Proposed Order ¶ 201). In Delaware, "an implied covenant of good faith and fair dealing inheres in every contract." Chamison v. HealthTrust, Inc. Hosp. Co., 735 A.2d 912, 920 (Del.Ch.1999). "[A] party to a contract has made an implied covenant to interpret and to act reasonably upon contractual language that is on its face reasonable." Id. (citing Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del.Ch.1984)). However, "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434, 441 (Del.2005). Here, the conduct which Smoking Everywhere complains was done in bad faith—the sending of an increased number of leads to new URLs-was authorized by the modified Insertion Order. Accordingly, CX Digital engaged in authorized conduct and did not act in bad faith.

7. Mutual Mistake

*16 Smoking Everywhere suggests the Insertion Order or the modification may have been based on a mutual mistake:

The alleged pre-contractual representations that the parties were allegedly mistaken about are not contained in the agreement, but rather are expressly disclaimed and contradicted by the agreement as it readily available [sic] that they [sic] leads were sent to the wrong URLs and were sent in a volume excessive [sic] of that which was agreed upon.

(Pl.'s Proposed Order ¶ 202). The seminal case involving mutual mistake concerned the sale of a pregnant cow named Rose 2d of Aberlone. *See Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919, 920 (Mich.1887). The defendant-sellers in *Sherwood* proved that "at the time of the alleged sale [of Rose] it was believed by both the [buyer and the seller] that the cow was barren and would not breed." *Id.* at 920. The court held

it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact,—such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement; and this can be done when the mistake is mutual.

Id. at 923; *see also Collins v. Burke*, 418 A.2d 999, 1002 (Del.1980) ("The Courts of this State have always insisted in reformation cases on a showing of mutual mistake.").

The undersigned read Smoking Everywhere's argument, struggled, and ultimately failed to understand what exactly Smoking Everywhere believes both parties were mistaken about at the time they signed the Insertion Order. Smoking Everywhere observes that "[t]he number of leads upon which the invoices are based and the URL addresses to which they were supposed to be sent for tracking purposes are material," which implies that

Smoking Everywhere thinks both parties were confused about where CX Affiliate traffic should go and how much should be sent. However, throughout this litigation Smoking Everywhere has maintained that both parties "agreed that they would send up to 200 leads per day to the URLs specified in the contract." (Pl.'s Proposed Order ¶ 207). Smoking Everywhere further confuses the situation by adding, "CX must have known of [discovered?] this mistake, as it attempted to change the contract and modify it to unlimited leads and change [sic] the directed URLs," (id. ¶ 202), and "this could even be considered a unilateral mistake, as CX is able to direct the leads to a specific URL and send too many leads, did [sic] just that" (id. ¶ 204). These statements do not bring the Court any closer to understanding what mistake of material fact Smoking Everywhere believes the Insertion Order was based on, and no mutual mistake is obvious from the record. Rather, in this case, it appears the parties got the cow they bargained for.

III. DAMAGES

*17 CX Digital is entitled to damages pursuant to the Insertion Order as modified by the September 2nd instant messages. This includes payment for up to 600 Sales per day prior to September 2, 2009, and to an unlimited number of Sales per day after September 2, 2009. CX Digital through its affiliates, completed or caused to be completed 670 Sales before September 2, 2009, and 27,459 Sales during the remainder of September 2009. (See Agreed Trial Ex. 2). CX Digital is entitled to \$45.00 for

each of those Sales. This totals \$30,150.00 for the 670 Sales completed prior to the modification and \$1,235,655.00 for the 27,459 Sales completed after the modification. Smoking Everywhere paid a \$5,000 deposit toward the balance. (*See* Trial Tr. I at 185:7–8). Therefore, Smoking Everywhere owes CX Digital \$1,260,805.00.

Pursuant to the Insertion Order, CX Digital is entitled to 1.5% interest per month on the \$25,150.00 August 31, 2009 invoice accruing from September 15, 2009. CX Digital is also entitled to 1.5% interest per month on the balance of \$1,240,655.00 accruing from October 15, 2009. (*See* Insertion Order ¶ 3). CX Digital is also entitled to all attorney's fees and costs related to the enforcement of the Insertion Order. (*See id.* ¶ 3).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that final judgment will be entered by separate order in favor of CX Digital Media, Inc. and against Smoking Everywhere, Inc. CX Digital is asked to submit ²⁶ a proposed order of final judgment by March 30, 2011.

DONE AND ORDERED.

All Citations

Not Reported in F.Supp.2d, 2011 WL 1102782

Footnotes

- 1 It was emphasized at trial and is therefore worth mentioning here that electronic cigarettes are not "a smoking cessation device." (Trial Tr. III at 25:4–21).
- The parties' agreement permits "All forms of Email, Web/Banners, and Search," but prohibits "Incentivized or Freebie Traffic." (Trial Ex. 1 at 1).
- The terminology used at trial was inconsistent and confusing. For instance, the term "advertiser" was used to describe both CX Clients, who contracted to have their goods and services promoted by CX Digital, and the CX Affiliates, who ultimately placed the advertising content in emails or on web pages. Moreover, the terms "start page," "URL," "landing page," "confirmation page," and "thank-you page" were a significant source of confusion for counsel and the witnesses. The terms "sale," "action," and "lead," although purportedly synonymous, acquired and lost shades of meaning depending on who was talking.

In this Order, the Court has endeavored to be precise in its use of these terms where possible and to minimize its use of synonyms where one term would do. For example, the Court uses only the term "Sale" where the parties use "sale," "lead," "order," and "action" to refer to the firing of the CX Digital pixel on Smoking Everywhere's thank-you page. (See Insertion Order 1 [Agreed Trial Ex. 1]).

- The landing page may allow the user a great deal of freedom to explore the Client's website and learn about the product. It need not force the consumer to follow a straight path to purchasing the product or service. (See Trial Tr. II at 26:8–24).
- There need only be one thank-you page for any number of affiliates or affiliate marketing providers because all of them can place their pixel on the same page and get credit for their referrals. (See Trial Tr. III 9:7–21 ("[W]e had one 'Thank you' page for all affiliates."). But see Trial Tr. II at 88:5–89:5 (stating each landing page got its own thank-you page)).
- The Insertion Order required Smoking Everywhere to place CX Digital's pixel on its thank-you page. The pixel was to be used for all billing purposes. (See Insertion Order 1).
- 7 CX Digital is not seeking to recover the additional \$6.00 per Sale in this litigation. (See Trial Tr. I at 23:19–20).
- 8 The instant-message application recorded the file transfer in this way:

ATTENTION (10:57:56): Transfer Complete: Pixel and TestNon Video Page-cxd1.txt

ATTENTION (10:58:02): Transfer Complete: Pixel and TestVideo Page-cxd2.txt

- (*Id.*). The Court notes that the tracking pixels' filenames contain "cxd1" and "cxd2;" these pixel names are consistent with the new "cxd1" and "cxd2" URLs that CX Digital contends it was supposed to, and did, send traffic to under the modification to the Insertion Order. This is additional evidence suggesting there was an agreement between Touris and Soltani to redirect traffic to the new cxd URLs.
- 9 Touris admitted that CX Digital would not get credit for a Sale if it sent customers to the wrong URL. (See Trial Tr. II at 90:12–18).
- 10 Smoking Everywhere emphasized at trial that the specific URLs CX Digital sent traffic to were important because Smoking Everywhere used these for some kind of tracking purpose. (See Trial Tr. II at 90:24–91:1; Trial Tr. III at 7:20–23). Just how Smoking Everywhere's tracking system worked or what it actually tracked was neither clear to the Court nor to Smoking Everywhere. (See id. at 86:1–91:14).

As best the Court can gather, Smoking Everywhere would count the number of Sales it processed on its thank-you page and compare that to the number of hits on a particular landing page and then assume, but not verify, that all of those hits came from a particular source, like CX Digital's affiliate network. However, this system would only reveal the conversion rate—i.e., the percentage of hits on the landing page that became Sales and would only work if there was a unique thank-you page for every landing page. (See Trial Tr. II at 87:2–88:11). But that was not the case: "[W]e had one 'Thank you' page for all affiliates, ... for everybody. We did not build different 'Thank you' page So no matter for what landing page you come, you always gonna end up in the same 'Thank you' page after you process the credit card and get approved." (Trial Tr. III at 9:15–21; but see Trial Tr. II at 88:5–8 ("Q. So, in other words, you had a specific 'Thank you' page also ... [f]or each? A. Correct.")).

This system could not provide any information about fraud or misleading advertising that Smoking Everywhere could use to dispute the number of Sales CX Digital generated under the Insertion Order (see Trial Tr. III at 44:17–46:9, 47:22–48:20), and so even if CX Digital had sent the September affiliate traffic to the original URLs, Smoking Everywhere would have had no additional information relevant to the enforcement of the Insertion Order. Moreover, this argument is irrelevant because it is clear that Touris assented to the modification of the Insertion Order by agreeing and cooperating with Soltani to switch from the "old ecig" URL to the new cxd URLs.

- To the extent it is unclear when precisely the agreement between the parties was formed, "[a] manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined." RESTATEMENT § 22.
- 12 Touris's authority to bind Smoking Everywhere is discussed below.
- As discussed in more detail below, after this modification, there are days when CX Digital sends well over 2,000 leads per day, which suggests it also understood the modification of the Insertion Order to be to eliminate the limit rather than to raise it to 2,000 per day.
- 14 Citations to days three and four of the trial, which occurred on February 16, 2011 and March 8, 2011, are to the unofficial transcript because neither party has requested the preparation of an official version.
- It is clear from Soltani's "awesome!" reply that Soltani interpreted Touris's statement as a direct response to the offer to increase the number of Sales. Moreover, Touris does not react to or correct Soltani's exclamation of "awesome!" in any way that would indicate confusion about the subject matter of their discussion. Indeed, the conversation reads most naturally when understood as two people negotiating and reaching a modification of an existing agreement.
- Moreover, anyone who has used an instant-message application in an office setting will recognize these time lags between responses as typical of the medium.
- The court immediately added, "however, it does provide an adequate basis, when considered in the context of the parties' subsequent conduct, to support a claim for equitable estoppel." Severn Sav., Bank, 2007 WL 4054231, at *10.

- To the extent *Severn Savings* was concerned about the ambiguity of terms in an oral modification rather than whether one existed at all, it should have applied the standard in *Haft v. Dart Group Corp.*, 877 F.Supp. 896, 906 (D.Del.1995), rather than *Reeder*, 397 A.2d 139.
- The common-law rule applies because this a contract for the sale of services, not goods. Therefore, Delaware Code § 2–209, derived from the Uniform Commercial Code and permitting a signed-writing requirement, does not apply.
- Although the parties did not raise the issue, the Court has satisfied itself that neither the agreement memorialized by the Insertion Order nor the modification of the Insertion Order made during the instant-message conversation falls within Delaware's statute of frauds. See 6 Del.Code § 2714. In any case, the statute of frauds is an affirmative defense; it was not pleaded by the Defendant and is therefore waived. See FED. R. CIV. P. 8(c)(1).
- Smoking Everywhere argues that "Plaintiff has not made any type of claim for equitable relief," and therefore the parties' subsequent conduct cannot be "used towards the claim of equitable estoppels [sic]." (Def.'s Proposed Order ¶ 135). This is based on a misunderstanding. The concept of promissory estoppel as a substitute or alternative basis of enforcement antedates the recognition of a cause of action for promissory estoppel. See, e.g., Hoffman v. Red Owl Stores, Inc., 26 Wis.2d 683, 133 N.W.2d 267, 275 (Wis.1965) (citing WILLISTON 307 (1st ed.)). ("Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration."). Here, reliance is a substitute for consideration, not a cause of action.
- 22 Smoking Everywhere actually argues that, because it did not in fact pay a \$20,000 deposit in a proposed, but not signed, Insertion Order that was excluded from evidence, there was no consideration for the modification. (See Pl.'s Proposed Order ¶ 137). If that proposed insertion order had been adopted and Smoking Everywhere had not paid the deposit, the failure to pay would not be a failure of consideration but rather a breach of the agreement. Despite Smoking Everywhere's confusion about what "consideration" is, the Court has charitably interpreted Smoking Everywhere's argument and addressed whether there was some basis to enforce the modification.
- During the first day of trial the Court commented, "Instant Messages and emails do not satisfy the contract's plain terms for how the parties would need to amend it. I agree with you there." (Trial Tr. I at 114:2–4). However, what was not addressed was whether under Delaware law the modification might nevertheless be enforced. (See Feb. 16 Trial Tr. at 39:23–40:6). The second day of trial, Plaintiff's counsel had the following exchange with the Court:

MR. BOESE: And if I could say one thing, Your Honor, just for clarification. I want to be clear, I don't want Mr. Blackburn to fail to investigate any areas because of Your Honor's sort of interim ruling that the Instant Message would not successfully amend the contract.

THE COURT: Very well.

(Trial Tr. II at 4:8–13). Mr. Blackburn apparently did not hear this exchange because, during closing argument, when the Court noted that Delaware law permitted oral modifications even where a contract contained a signed-writing requirement to amend it, Mr. Blackburn expressed dismay that he was "wholly unprepared to continue this in light of ... these new issues and the potential that ... there now could be a modification to this contract." (Feb. 16 Trial Tr. 35:4–9).

Soltani did send a second insertion order (excluded from evidence because of Defendant's abuse of discovery) to Smoking Everywhere around two weeks after the September 2nd instant messages. (See Trial Tr. I at 49:11–14). This second insertion order recorded the URL and Sale-volume limit changes that had been made during the instant-message conversation. (See Trial Tr. II at 58:1–3, 58:22–25–59:1–3). Smoking Everywhere argues this shows that Touris had only been negotiating during the instant-message conversation and that no final agreement on the modifications had been reached because he had not had a chance to discuss the new insertion order with Taieb. (See Pl.'s Proposed Order ¶¶ 141–44).

This argument ignores the fact that by the time the new insertion order was sent to Smoking Everywhere, CX Digital had been sending much higher daily volumes of Sales to the new URLs, with Smoking Everywhere's knowledge, for two weeks. If Smoking Everywhere did not believe it had modified the original Insertion Order, Touris could have objected to the increased volume to the new URLs in one of his frequent conversations with Soltani during that two-week period. (See Trial Tr. II at 11:19–20 ("I chatted with [Soltani] almost on a daily basis.")).

- Of course, as discussed above, Soltani could have concluded Touris had the authority to agree to change the URLs from the fact that Touris cooperated with Soltani during the technical process to change the URLs.
- Pursuant to the CM/ECF Administrative Procedures, proposed orders shall be filed as an attachment to a motion, notice, or other filing. The proposed document must also be e-mailed to the judge at the judge's email address. The proposed document shall be submitted by e-mail in WordPerfect or Word format. The e-mail line and the name of the attachment should include the case number, followed by a short description of the attachment (e.g., 00–cv–00000 Order).

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit Z

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

NEXTEER AUTOMOTIVE, a Delaware corporation,

Plaintiff,

٧

Case No. 13-021401-CK-1 JUDGE M. RANDALL JURRENS

MANDO AMERICA CORPORATION, a Michigan corporation, TONY DODAK, an Individual; ABRAHAM GEBREGERGIS, an Individual; RAMAKRISHNAN RAJAVENKITASUBRAMONY, an Individual; CHRISTIAN ROSS, an Individual; KEVIN ROSS, an Individual; TOMY SEBASTIAN, an Individual; THEODORE G. SEEGER, an Individual; TROY STRIETER, an Individual; JEREMY J. WARMBIER, an Individual; and SCOTT WENDLING, an Individual, jointly and severally,

ORDER DENYING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER AND
EXPEDITED DISCOVERY

Defendants.

MILLER, CANFIELD, PADDOCK and STONE, P.L.C. RICHARD W. WARREN (P63123) JEROME R. WATSON (P27082) SONI MITHANI (P51984) Attorneys for Plaintiff Nexteer Automotive 150 West Jefferson, Suite 2500 Detroit, MI 48226 (313) 963-6420

BRAUN KENDRICK FINKBEINER, PLC C. PATRICK KALTENBACH (P15666) Attorneys for Individual Defendants 4301 Fashion Square Boulevard Saginaw, MI 48603 (989) 498-2100 GIARMARCO, MULLINS & HORTON, P.C. WILLIAM H. HORTON (P31567)
ANDREW T. BARAN (P31883)
Attorneys for Defendant Mando America Corporation
101 W. Big Beaver Road – Tenth Floor Troy, MI 48084-5280
(248) 457-7000

SHEA AIELLO & DOXSIE, PLLC DAVID J. SHEA (P41399)
Attorneys for Individual Defendants 26200 America Dr., Fl. 3
Southfield, MI 48034
(248) 354-0224

ORDER DENYING PLAINTIFF'S MOTION FOR TEMPORARY

RESTRAINING ORDER AND EXPEDITED DISCOVERY
At a session of said Court, held in the court- rooms thereof, City of Saginaw, County of Saginaw, State of Michigan, on NOV 2 6 2013 PRESENT: Honorable, This matter having come before the Court on Plaintiff's Motion, the Court having
read the pleadings of the parties, heard oral argument and being advised in the
premises;
IT IS HEREBY ORDERED that Plaintiff's Motion for Temporary Restraining
Order and Expedited Discovery is hereby DENIED.
HON. RANDALL JURRENS
Approved as to form:
Richard Warren Java by permusion RICHARD W. WARREN (P63123)
Andrew Ber ANDREW T. BARAN (P31883)
•

Patrick Kaltenbach (Are by permission C. PATRICK KALTENBACH (P15666)

DAVID J. SHEA (P41399)

A TRUE COPY Susan Kaltenbach, Clerk